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WILCOX & CO

Submitted to Wilbur, Mathews and Stephens, Circuit Judges

No. 10364

# United States Circuit Court of Appeals

For the Ninth Circuit.

Vol 2345

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

REGISTER PUBLISHING CO., Ltd., a corporation,

Respondent.

# Transcript of Record

## In Two Volumes

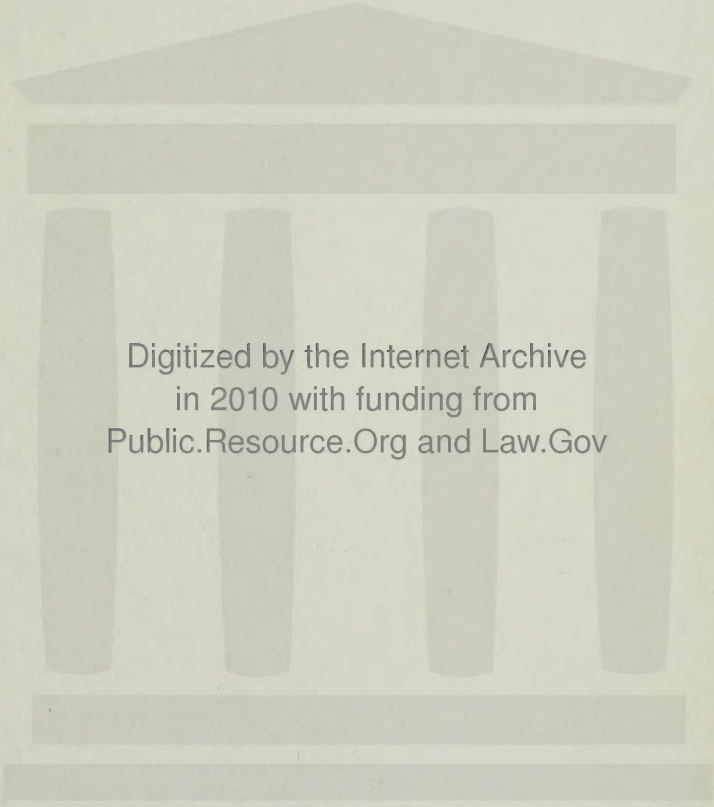
## VOLUME I

**Pages 1 to 337**

Upon Petition for Enforcement of an Order of the National Labor Relations Board

FILED
APR 1 - 1943
PAUL P. O'BRIEN,
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# Circuit Court of Appeals
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**Upon Petition for Enforcement of an Order of the National Labor Relations Board**

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO 60-8-26-48

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BOARD'S EXHIBIT No. 1-A

N. L. R. B. 29
(Revised 8-9-41)

United States of America
Before The National Labor Relations Board
21st Region
Case No. XXI-C-1737

Date Filed March 27, 1942

In the Matter of—

REGISTER PUBLISHING CO. LTD.,

and

SANTA ANA INTERNATIONAL TYPOGRAPHICAL UNION No. 579.

## FIRST AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Register Publishing Co., Ltd., at Santa Ana, California, employing 78 workers in Newspaper publishing business has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1), (3) and (5) of said Act, in that on or about March 1, 1940, and at all times thereafter, it, by its officers, agents and employees, refused to bargain collectively with the authorized representatives of the Santa Ana International Typographical Union No. 579, a labor organization, chosen by a majority of its employees in a unit consisting of all employees in the composing room of

its Santa Ana Register Plant for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment. A unit consisting of all employees in the composing room of the Santa Ana Register Plant is an appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment, and by refusing to bargain with the duly designated representative of the majority of the employees in said unit, the Company, by its officers, agents and employees, did engage in and is engaging in unfair labor practices within the meaning of Section 8, subsection (5) of the Act.

On or about July 29, 1941, and at all times since that date, the Company has refused to reinstate and employ:

| | |
|---|---|
| A. L. Berkland | J. W. Jones |
| F. L. Berkland | W. A. Lawrence |
| C. W. Brakeman | J. H. Patison |
| William O. Bray | L. C. McKee |
| G. J. Bronzen | J. W. Parkinson |
| Charles Clayton | J. A. Sherwood |
| G. W. Duke | V. C. Shidler |
| E. W. Ellis | J. E. Swanger |
| W. H. Fields | E. Y. Taylor |
| G. L. Hawk | C. C. Thrasher |

Said refusal to reinstate and employ being for the reason that said employees, and each of them, had engaged in concerted activities for the purpose of collective bargaining and other mutual aid and pro-

tection through their designated representative, the Santa Ana International Typographical Union No. 579, and by said refusal to reinstate and employ said persons and each of them, the Company is engaging in unfair labor practices within the meaning of Section 8, subsection (3) of the Act.

By the acts set forth above, and by written and oral statements to its employees derogatory to the Union, and by attempting to organize a back to work movement among its striking employees, the Company, by its officers, agents and employees, has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

SANTA ANA INTERNATIONAL
TYPOGRAPHICAL UNION
No. 579
J. W. JONES, Vice-President
837 N. Garnsey St., Santa Ana,
California
Telephone - Santa Ana 5714-J

Subscribed and sworn to before me this 27th day of March, 1942, at Los Angeles, California.

CHARLES M. RYAN,
Attorney, 21st Region, National Labor Relations Board,
Los Angeles, California.

---

BOARD'S EXHIBIT No. 1-C

[Title of Board and Cause.]

COMPLAINT

It having been charged by Santa Ana International Typographical Union No. 579, hereinafter called the "Union," that Register Publishing Co., Ltd., hereinafter called the "Respondent," at Santa Ana, California, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, approved July 5, 1935, 49 Stat. 449, hereinafter referred to as the "Act," the National Labor Relations Board, by the Regional Director for the Twenty-first Region, designated as agent of said National Labor Relations Board, by its Rules and Regulations—Series 2, as amended, hereby issues its Complaint and alleges the following:

1. Respondent, Register Publishing Co., Ltd., is and at all times hereinafter referred to has been a corporation organized and existing under and by virtue of the laws of the State of California. Said

Company has its principal office and place of business at Santa Ana, California. It is engaged in the publication, distribution and sale of a daily newspaper, known as the "Santa Ana Register," hereinafter referred to as the "Register."

2. The Register is a newspaper published daily, including Sunday, by Respondent, at its plant at Santa Ana, California. Said newspaper is distributed throughout the State of California. In addition, a substantial portion of its daily circulation is sold and distributed outside the state of California.

3. Respondent, in the course and conduct of its business, as described in paragraphs 1 and 2 above, causes and has continuously caused large quantities of raw materials used in its business, including specifically, but without limitation thereby, news print and mats to be transported to Respondent's place of business at Santa Ana, California, from other states of the United States and from foreign countries.

4. Respondent, in the course and conduct of its business, as described in paragraphs 1, 2 and 3 above, daily supplies news to, and daily receives news from, several well known news services, which gather and disseminate news nationally and internationally. Said Respondent, in the course and conduct of its business, likewise daily receives and publishes numerous feature services, the material for many of which is prepared and originates in states of the United States other than the state of California. Further said Respondent, in the course and conduct of its business, daily publishes in substan-

tial amounts advertising originating outside the State of California.

5. Santa Ana International Typographical Union No. 579, hereinafter called the "Union," is a labor organization within the meaning of Section 2, subsection (5) of the Act.

6. Respondent, by its officers and agents, R. C. Hoiles and C. H. Hoiles, while engaged at its Santa Ana plant, as described in paragraphs 1, 2, 3 and 4 above, at various and divers times since March 1, 1940, has made known to its employees its hostility toward labor organizations, particularly the Union, by criticizing and condemning unions as rackets and union members as racketeers, by criticizing and condemning the principles of collective bargaining, by questioning employees regarding their loyalty to the union, by statements to the effect that unions have never benefited anyone and employees are better off without a union, and by statements to the effect that it would never, under any circumstances, enter into a written signed contract with the Union, and by promises of reward to employees if they would withdraw from membership in and, activity in behalf of the Union; and by such acts and each of them the Respondent did interfere with, coerce and restrain and is interfering with, coercing and restraining its employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

7. The acts alleged in paragraph 6 above, oc-

curred on or about March 1, 15, 20 and 27, 1940, and on or about April 15, 1940, and on or about May 3 and 16, 1940, and on or about January 15, 1941, and on or about March 1, 1941, and on or about April 3, 18, 23, 26, 29 and 30, 1941, and on or about May 1, 2, 3, 4 and 5, 1941, and on or about August 2, 1941, and on numerous occasions thereafter up to and including the date of this complaint.

8. A unit for the purpose of collective bargaining composed of all employees in the composing room of Respondent's Santa Ana plant would insure to Respondent's employees the full benefit of the right to self-organization and would otherwise effectuate the policies of the National Labor Relations Act, and is therefore a unit appropriate for the purposes of collective bargaining.

9. Prior to March 1, 1940, and at all times thereafter, a majority of the employees in the unit set forth in paragraph 8 above did designate the Union as their representative for the purpose of collective bargaining with Respondent. By virtue of said designation, the Union is and has been at all times since March 1, 1940, the exclusive representative of all employees in the unit set forth above for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

10. The Respondent, while engaged at its Santa Ana plant as aforesaid, on or about March 1, 1940, and at all times thereafter, refused and failed and does now refuse and fail to bargain collectively in good faith with respect to rates of pay, wages, hours

of employment and other conditions of employment with the Union, as exclusive representative of all employees in the unit set forth in paragraph 8 above. By such acts and each of them, Respondent did engage in and is now engaging in unfair labor practices within the meaning of Section 8, subsection (5) of the Act.

11. The Respondent, by its acts and each of them as set forth in paragraph 10 hereof, did interfere with, coerce and restrain, and is interfering with, coercing and restraining its employees in their exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

12. On or about May 1, 1941, Respondent's employees in the unit set forth in paragraph 8 hereof did go on strike and did picket Respondent's plant. The strike is still being carried on. Said strike was caused by and has been prolonged by Respondent's unfair labor practices alleged in paragraphs 6 and 10 hereof.

13. On or about July 29, 1941, the Union did request the Respondent to reinstate and employ the employees and each of them who had gone on strike on or about May 1, 1941, namely:

| | |
|---|---|
| A. L. Berkland | J. W. Jones |
| F. L. Berkland | W. A. Lawrence |
| C. W. Brakeman | J. H. Patison |
| William O. Bray | L. C. McKee |
| G. J. Bronzen | J. W. Parkinson |

| | |
|---|---|
| Charles Clayton | J. A. Sherwood |
| G. W. Duke | V. C. Shidler |
| E. W. Ellis | J. E. Swanger |
| W. H. Fields | E. Y. Taylor |
| G. L. Hawk | C. C. Thrasher |

and the Respondent has at all times refused and failed, and does now refuse and fail, to reinstate and employ the employees and each of them who went out on strike on or about May 1, 1941, said refusal to reinstate and employ the aforesaid employees and each of them being for the reason that they had formed, joined and assisted a labor organization of their own choosing, to wit, the Union, and had engaged in concerted activities for the purposes of collective bargaining and other mutual aid and protection.

14. Respondent, by its refusal to reinstate and employ the employees and each of them who went out on strike on or about May 1, 1941, as set forth in paragraph 13 above, did discriminate and is now discriminating in regard to hire and tenure of employment of the above-named employees and each of them, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (3) of the Act.

15. Respondent, by its acts and each of them, as set forth in paragraphs 13 and 14 above, did interfere with, coerce and restrain and is interfering with, coercing and restraining its employees in their exercise of the rights guaranteed in Section 7 of the National Labor Relations Act and did thereby en-

gage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

16. The acts of Respondent as set forth in paragraphs 6, 10, 11, 12, 13 and 14 of this Complaint, occurring in connection with the operations of Respondent as described in paragraphs 1, 2, 3 and 4 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and have led and now lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

17. The aforesaid acts of Respondent, as set forth in paragraphs 6, 10, 11, 12, 13 and 14 of this Complaint, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1), (3) and (5) and Section 2, subsections (6) and (7) of the National Labor Relations Act.

Wherefore, the National Labor Relations Board, on the 23d day of April, 1942, issues its Complaint against Register Publishing Co., Ltd., Respondent herein.

## NOTICE OF HEARING

Please Take Notice that on the 7th day of May, 1942, in the Council Chambers on the third floor of the City Hall at Third and Main Streets, in Santa Ana, California, at 10:30 in the forenoon, a hearing will be conducted before the National Labor Relations Board, by a Trial Examiner to be designated by it in accordance with its Rules and Regulations—Series 2 as amended, Article IV and Article II,

Section 23, on the allegations set forth in the Complaint hereinabove set forth, at which time and place you will have the right to appear in person or otherwise, and give testimony.

You are further notified that you have the right to file with the Regional Director for the Twenty-first (21st) Region, acting in this matter as the agent of the National Labor Relations Board, an answer to the foregoing Complaint, on or before the 6th day of May, 1942.

Enclosed herewith for your information is a copy of the Rules and Regulations, Series 2 as amended, made and published by the National Labor Relations Board, pursuant to authority granted in the National Labor Relations Act. Your attention is particularly directed to Article II of the said Rules and Regulations.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In Witness Whereof, the National Labor Relations Board has caused this, its Complaint and its Notice of Hearing, to be signed by the Regional

Director for the Twenty-first Region on the 23rd day of April, 1942.

[Seal] WM. R. WALSH,
Regional Director, 21st Region, National Labor Relations Board, 808 U. S. Postoffice & Courthouse Building, Los Angeles, California

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BOARD'S EXHIBIT No. 1-D

[Title of Board and Cause.]

AFFIDAVIT AS TO SERVICE

State of California,
County of Los Angeles—ss.

I, Marion Riemer, being duly sworn, depose and say that I am an employee of the National Labor Relations Board, in the 21st Region at Los Angeles, California, on the 23rd day of April, 1942, I served by postpaid registered mail, bearing Government frank a copy of

Complaint, Notice of Hearing, and First Amended Charge to the following named persons, addressed to them at the following addresses:

Register Publishing Co., Ltd.
Santa Ana, California

Santa Ana International Typographical Union No. 579,

837 North Garnsey Street

Santa Ana, California

Attention: J. W. Jones, Vice President

MARION RIEMER.

Subscribed and sworn to before me this 23rd day of April, 1942.

(Illegible)

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Nov. 24, 1943.

---

BOARD'S EXHIBIT No. 1-F

United States of America Before the National Labor Relations Board, Twenty-First Region

In the Matter of REGISTER PUBLISHING CO., LTD.,

and

SANTA ANA INTERNATIONAL TYPOGRAPHICAL UNION No. 579.

ANSWER

Comes Now Respondent, Register Publishing Co., Ltd., a corporation, and answering the Complaint on file herein admits, denies and alleges as follows:

1. Answering Paragraph 1 of the Complaint, Respondent admits the allegations of the same.

2. Answering Paragraph 2 of the Complaint, Respondent admits the allegation that the Register Publishing Co., Ltd. is a newspaper published daily by Respondent at its plant in Santa Ana, California, but denies the allegation that it is published Sunday, the allegation that it is distributed throughout the state of California, and the allegation that a substantial portion of its daily circulation is sold and distributed outside the state of California. Respondent alleges that its total circulation as of April 30th, 1941, when the strike mentioned hereinafter was commenced, was 15,659, of which only 89 were circulated outside the county but inside the state, and only 51 were circulated outside the state, largely for accommodation.

3. Answering Paragraph 3 of the Complaint, Respondent admits that its news print and mats come from without the state but denies that it causes or has continually caused large quantities of raw materials used in its business, exclusive of news print or mats, to be transported to Respondent's place of business at Santa Ana either from other states of the United States or from foreign countries.

4. Answering Paragraph 4 of the Complaint, Respondent denies each and every allegation contained therein, except that it admits that it receives and publishes daily except Sunday certain feature services the material for certain of which is prepared and originates outside the state of California

and that Respondent, in the course and conduct of its business daily except Sunday publishes advertising originating outside the state of California.

5. Answering Paragraph 5 of the Complaint, Respondent admits the allegations of the same.

6. Answering Paragraph 6 of the Complaint, Respondent denies each and every allegation contained therein.

7. Answering Paragraph 7 of the Complaint, Respondent alleges that it lacks information sufficient to form a belief, and on that ground denies each and every allegation contained therein.

8. Answering Paragraph 8 of the Complaint, Respondent denies each and every allegation contained therein, except that it admits that a unit composed of all employees in the composing room of Respondent's plant would be a unit appropriate for the purposes of collective bargaining.

9. Answering Paragraph 9 of the Complaint, Respondent denies each and every allegation contained therein, except that it admits that prior to March 1st, 1940, and for a period thereafter extending not later than April 30th, 1941, a majority of the employees in Respondent's composing room did designate the Union as their representative for the purpose of collective bargaining with Respondent, and that up to and including April 30th, 1941, the Union was the exclusive representative of all employees in the said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

10. Answering Paragraph 10 of the Complaint, Respondent denies each and every allegation contained therein.

11. Answering Paragraph 11 of the Complaint, Respondent denies each and every allegation contained therein.

12. Answering Paragraph 12 of the Complaint, Respondent denies each and every allegation contained therein, except that it admits that on the night of April 30th and on the morning of May 1st, 1941, certain of Respondent's employees in the composing room did go on strike and did picket Respondent's plant.

13. Answering Paragraph 13 of the Complaint, Respondent denies each and every allegation contained therein.

14. Answering Paragraph 14 of the Complaint, Respondent denies each and every allegation contained therein.

15. Answering Paragraph 15 of the Complaint, Respondent denies each and every allegation contained therein.

16. Answering Paragraph 16 of the Complaint, Respondent denies each and every allegation contained therein.

17. Answering Paragraph 17 of the Complaint, Respondent denies each and every allegation contained therein.

Wherefore: Respondent prays the Complaint on file herein be dismissed.

REGISTER PUBLISHING CO., LTD.,
Santa Ana, California.
By C. H. HOILES,
Secretary-Treasurer.
WILLIS SARGENT,
Attorney for Respondent.

State of California,
County of Orange—ss.

C. H. Hoiles, being by me first duly sworn, deposes and says:

That he is the Secretary-Treasurer of the Register Publishing Co., Ltd., The Respondent in the above entitled matter, and that he makes this verification for and on behalf of said Register Publishing Co., Ltd., that he has read the foregoing Answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated to be without the knowledge of Respondent, and as to those that he believes it to be true.

C. H. HOILES.

Subscribed and Sworn to before me this 5 day of May, 1942.

[Seal] BLANCHE P. GILBERT,
Notary Public in and for the County of Orange, State of California.

[Title of Board and Cause.]

Mr. Charles M. Ryan,
For the Board.

Mr. Willis Sargent and Mr. Paul Hart, of Los Angeles,
For the respondent.

Mr. Seth R. Brown of Los Angeles,
For the Union.

## INTERMEDIATE REPORT

### Statement of the Case

Upon an amended charge filed March 27, 1942, by Santa Ana International Typographical Union No. 579, affiliated with the International Typographical Union, herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Twenty-first Region (Los Angeles, California), issued its complaint dated April 23, 1942, against Register Publishing Co., Ltd., herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent (1) on or about March 1, 1940, and at all times

thereafter, refused to bargain collectively with the Union, although at all such times it was the exclusive representative of all the employees in the composing room of respondent's Santa Ana plant, a unit appropriate for the purposes of collective bargaining; (2) since March 1, 1940 has indicated its hostility to the Union and thereby has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed under the Act; (3) since July 29, 1941, has refused to reinstate 20 named employes,[1] who had gone out on strike on May 1, 1941, because of the unfair labor practices described above, despite their application for reinstatement.

The respondent's answer filed May 6, 1942, denied the jurisdiction of the Board and denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held in Santa Ana, California, on May 7, 8, and 11, 1942, before Will Maslow, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by a representative; all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the close of the Board's case, and again at the close of the hearing, the respondent moved to

---

1) On the Board's motion and without objection, two names were stricken from the complaint by the Trial Examiner.

dismiss the complaint because of lack of jurisdiction and also on the merits because of lack of proof. These motions were denied.[2]

At the close of the hearing, both the attorney for the Board and the respondent moved to conform the pleadings to the evidence adduced. These motions were granted. At the close of the hearing, the attorneys for the Board and the respondent argued orally before the undersigned. A brief was also submitted by the respondent.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

## FINDINGS OF FACT

### I. The business of the respondent

The respondent is a California corporation which publishes a newspaper, known as the Santa Ana Register, herein called the Register, daily except Sundays, in Santa Ana, California. In 1940, there were 15,032 subscribers to the Register, of whom 59 were located outside the State of California. In 1940 all of the newsprint used by the respondent, amounting to 1,431,000 pounds, was purchased by it for $34,636 and shipped to Santa Ana from Canada. That same year miscellaneous materials and equipment in the sum of $7,000 were likewise shipped from points outside the State of California to its plant in Santa Ana.

The respondent subscribes to the news services

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(2) The official reporter inadvertently omitted the second denial of these motions. In any event they are hereby denied.

of the Associated Press, the United Press, and the International News Service; the greater part of the news of these services is gathered out of the State of California by the services and transmitted to the Register. Such news constitutes about 12% of the total news appearing in the Register. In addition, the Register publishes a miscellany of special features; about 90% of these features is furnished to it by feature services located outside of the State of California. These features constitute about 8% of the total reading material of the Register.

About 6% of the total revenue of the respondent is derived from national advertisers located outside the State of California. This advertising is transmitted to the Register by agencies likewise located outside the State of California. The respondent's total annual gross revenue is more than $300,000, two-thirds of which comes from its advertising and the remainder from its subscribers.

There has been no substantial change since 1940 in the operations of the respondent described above, except for a decline in national advertising.[3]

The strike of April 30, 1941, hereinafter described, resulted in no substantial interference with the operations described above, except that the May 1, 1941 issue of the Register was prepared by

---

(3) The above description of the respondent's operations is based on the undisputed testimony of C. H. Hoiles, the secretary-treasurer of the respondent.

a make-shift staff and was less than the usual size.[4]

The respondent employs from 80 to 85 persons, about 22 of whom worked in April 1941, as printers in its composing room.

## II. The organization involved

Santa Ana International Typographical Union No. 579, affiliated with the International Typographical Union formerly affiliated with the American Federation of Labor but now unaffiliated, is a labor organization of which all of the employees in the respondent's composing room were members on April 30, 1941.

## III. The unfair labor practices

### A. Background

The Register has been published in Santa Ana since at least 1909. From 1909 to about 1928 it was owned by one Baumgartner. In 1928 it was acquired by the respondent, the then chief stockholder being J. F. Burke. In 1935 the Hoiles family, the present stockholders and publishers, purchased the stock of the respondent and have held it ever since.

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(4) In N.L.R.B. v. Rath Packing Co., 115 F. (2d) (C.C.A. 8) the court held: ". . . the Board's jurisdiction is not limited to cases in which actual obstruction of commerce through labor disputes, strikes or lockouts has materialized." In N.L.R.B. v. Levaur, Inc., 115 F. (2d) 105 (C.C.A. 1) the court held:

> "Thus, the respondent's contention that the failure of the strike to affect interstate commerce prevents attachment of the Board's jurisdiction must be rejected."

From 1909 to 1935 the working conditions of the printers in the composing room were governed by an oral contract between the Union and the various owners of the Register. From 1935 to 1937 while the Hoiles family was in control, the terms of the prior oral contract were observed by the Hoiles although the oral contract was not formally renewed.

In 1937 the Union met with the publishers of the Register, the publishers of a competing newspaper, known as the Santa Ana Journal, and the owners of the commercial job printing shops in Santa Ana and negotiated a new agreement. The commercial job printers signed the agreement, but the publishers of the Register and the Santa Ana Journal refused to do so. The terms of the oral agreement with the Register were, however, reduced to writing. The 1937 contract increased the wage rate from the existing rate of 87½ cents an hour to 92 cents and provided for an additional increase to $1 during the life of the contract.

In 1939, at the expiration of the oral agreement, the respondent met with the Union and negotiated a renewal for the term of one year. The Union again asked the respondent to sign the agreement, but again the respondent refused. The 1939 agreement, which was likewise reduced to writing, provided for a closed shop, limited the number of apprentices the respondent could employ to three and regulated the type of work to be done by the apprentices. The wage scale was fixed at $1 an hour for a work week of five days of 7½ hours each. Time

and a half was required for work after 7½ hours each day, although the respondent was given the option of lengthening the work week to five days of 8 hours each without any overtime on giving the Union two weeks notice.

The contract also incorporated the by-laws of the International Typographical Union in relation to the control of apprentices and certain other matters. It expired on March 1, 1940.

The 1939 contract was substantially similar in its closed shop and apprenticeship clauses to the other oral agreements extending back to 1909.

### B. The refusal to bargain with the Union

#### 1. The appropriate unit

The complaint alleges, and the respondent's answer admits, that all the employees in the composing room of the respondent's Santa Ana plant constitute a unit appropriate for the purposes of collective bargaining. The undersigned finds that all the employees in the composing room of the respondent's Santa Ana plant have at all times material herein and do now constitute an appropriate unit and further finds said unit will ensure to the employees of the respondent the full benefit of their rights to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

#### 2. Representation of a majority in the appropriate unit

The complaint alleges that prior to March 1, 1940, and at all times thereafter a majority of the em-

ployees in the respondent's composing room did designate the Union as their representative for the purposes of collective bargaining with respondent and therefore the Union has been since March 1, 1940, and is now, the exclusive representative of all said employees for the purposes of collective bargaining. The respondent's answer admits that up to April 30, 1941, the Union was such exclusive representative.

On the night of April 30, 1941, the employees of the respondent ceased work concertedly and went on strike. The strike has continued ever since.

The undersigned finds that on March 1, 1940, and at all times thereafter,[5] the Union was and is the duly designated representative of a majority of employees in the above-described appropriate unit and pursuant to Section 9 (a) of the Act, the Union was at all times material herein and is now the exclusive representative of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The negotiations in 1940[6]

In March 1940, on the expiration of the 1939 contract, the Union submitted its proposals for a

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(5) Matter of A. Sartorius & Co., Inc., etc., 40 N.L.R.B., No. 20, 10 L.R.R. 358. The strike, as is hereinafter found, was caused by the respondent's unfair labor practices.

(6) The testimony of the Union representatives as to the negotiations both in 1940 and 1941 was substantially uncontradicted.

new contract, requesting a wage rate of $1.15 an hour and one week's vacation with pay. The existing contract provided for $1. an hour and contained no provisions for vacations. Early in March, C. H. Hoiles, the secretary-treasurer of the respondent and a son of R. C. Hoiles, president of the respondent, met with the Union's representative and rejected the proposals, stating that since the respondent paid overtime to its printers, it was opposed as a matter of principle to granting vacations with pay. The respondent also stated it would not increase the hourly rate. The Union then asked the respondent to submit its own offers which Hoiles did shortly thereafter.

That month the respondent proposed that there be no discrimination between Union and non-union members in its plant, which, as C. H. Hoiles testified, meant it wished to abolish the closed shop provisions of the contract. It further asked for full control of apprentices, eliminating all restrictions as to the number of apprentices it could hire and the type of work they could do during their apprenticeship. It also proposed that the work week be increased to 40 hours, consisting of 5 days of 7 hours each and one of 5. Finally, C. H. Hoiles requested several minor adjustments.

Each of the points set forth in the respondent's demands meant a worsening of the then existing conditions of employees, then numbering 22 printers and three apprentices.

Upon the receipt of these proposals, the Union requested the assistance of Seth R. Brown, a rep-

resentative of the International Typographical Union, [herein called the ITU] and formerly its first vice president, who came to Santa Ana to conduct the negotiations with the respondent.

Brown met with C. H. Hoiles on March 20, 1940, and discussed the respondent's proposals. Hoiles stated that the respondent wished to have full control of the work done by the apprentices during their six-year apprenticeship and specifically that apprentices should be allowed to work on the linotype machines prior to the last year of their apprenticeship. Brown in reply quoted from the by-laws of the ITU which he contended forbade the inclusion of such provisions in the contract of a subordinate local.

On March 27, 1940, the parties met again and continued their discussions.

On April 15, 1940, Brown and George Duke, vice president of the Union, met with C. H. Hoiles. Brown offered to submit to the Union for ratification a proposal that the wage rate be increased to $1.06 an hour, a drop from the original proposal of $1.15, but Hoiles immediately rejected this offer. Brown then suggested all matters in dispute be arbitrated, including the question of wages. This too was refused by Hoiles.[7] Duke then stated that if

(7) At the hearing it was shown that the by-laws of the ITU forbade any arbitration of the "general laws" of the ITU, which included provisions relating to apprentices. The respondent did not contend, however, that it knew of this prohibition at the time or that it was the reason for its refusal to submit the dispute to arbitration.

an agreement were reached, the Union wished it reduced to writing and signed. Hoiles replied that he would not consider signing a contract, that his word was good, and that the Union did not need to fear that he would violate an oral agreement.

Brown then requested the respondent to submit new offers and the meeting adjourned.

On May 3, Brown and C. H. Hoiles met again. Brown proposed a graduated wage scale and graduated provisions for vacations with pay, as follows:

$1.03 an hour to September 1, 1940.

1.04 an hour from September 1, 1940, to March 1, 1941.

1.05 an hour from March 1, 1941, to September 1, 1941.

1.06 an hour from September 1, 1941, to March 1, 1942.

1.08 an hour from March 1, 1942, to March 1, 1943.

2 days vacation with pay in 1940.

3 days vacation with pay in 1941.

5 days vacation with pay in 1942.

5 days vacation with pay in 1943.

C. H. Hoiles agreed to take the modified proposals under advisement. This was the second time the Union had lowered its original demands.

On May 16, 1940, the parties met again and C. H. Hoiles rejected the Union's modified proposals stating that he could not grant a wage increase no matter how small, because his other employees would then ask for a similar increase. The Union again asked for counter-proposals but Hoiles said he had none.

The Union met that night and decided to hold in abeyance the entire negotiations with respondent. No further conferences with the respondent were held until April, 1941. The terms of the oral agreement were observed, however, until May 1, 1941.

4. The negotiations in 1941

In March 1941, the Union negotiated a series of contracts with the commercial job printers in Santa Ana and with three weekly newspapers in the vicinity.[8] These contracts raised the hourly wage rate for printers from $1 an hour to $1.07 up to October 1, 1941, and to $1.12 from October 1, 1941, to October 1, 1942.

Early in April 1941, at the Union's request, C. H. Hoiles met again with the Union's representatives. Brown notified Hoiles of the contracts signed by the job printers and weekly newspapers and contending that the wage scale set forth in these contracts was now the prevailing wage rate in the county, asked Hoiles to meet that wage scale. Hoiles replied that while it would not embarrass the respondent financially to increase its printers' wages, it could not grant the increase, because other employees in other departments would expect like treatment.[9] Hoiles then proposed that the work week be increased from 37½ hours to 40 hours a

(8) The Journal, competitor of the Register, had ceased publication around November 1938.

(9) The respondent had no other union members among its employees except two stereotypers and two pressmen.

week, which necessitated the elimination of the overtime rate for the extra 2½ hours. The Union's representative rejected this proposal, but offered to submit it directly to the Union's membership.[10] The Union again requested that an agreement, if reached, be signed and Hoiles again refused. The apprenticeship question was also discussed and the parties renewed the contentions expressed in the 1940 conferences.[11]

On April 18, 1941, the parties met again and the Union notified C. H. Hoiles that its members had rejected the proposed increase of the work week to 40 hours at straight time pay. After some further discussion on wages, the Union asked the respondent for a new offer, but Hoiles declined to submit any. Brown then asked Hoiles to fix the date for another meeting. Hoiles replied, that they could meet again but it would not do any good; that they could talk about the war or the weather, but there would not be any increase in wages.

A meeting was nevertheless, scheduled for April 26. On that day as Brown awaited C. H. Hoiles at the respondent's plant, Brown was notified that the Union would receive a written statement of the respondent's position.

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(10) The Union at that time consisted of about 40 employees, about half of whom were employed by the respondent. It had several members who were unemployed.

(11) The respondent never withdrew the demands first made in March 1940.

On April 29, 1941, Brown received a letter from the respondent dated April 26 which read:

> In accordance with our recent negotiations, the Board of Directors of the Register Publishing Co., Ltd., have authorized me to place this proposition before you in writing.
>
> Namely, we are willing to allow our printers to work forty (40) hours a week, instead of 37½, at the same rate they are now getting of $1 an hour. This will give them a weekly increase of $2.50, or approximately $130 a year.
>
> Also, we are to have complete control of the number and work of our apprentices, as we see fit for efficient operation of our plant.
>
> Hoping this meets with your approval, we are,
>
> Very truly yours,
> REGISTER PUBLISHING CO., LTD.
> (s) C. H. HOILES
> Secretary-Treasurer

Following the receipt of C. H. Hoiles' letter, Brown met individually with Hoiles on the afternoon of April 30, 1941, and urged him to withdraw the respondent's proposition on apprentices and to confer further with the Union. Brown told Hoiles that if he did so there was a chance of settling the controversy. Hoiles replied that there would be no deviation from the terms set forth in the respondent's letter of April 26. Brown then told Hoiles the Union could not adopt the respondent's

proposal on apprentices, because it violated the general laws of the ITU.

That night the Union met and, after a report by Brown on the negotiations with the respondent, voted to go out on strike. Among the matters discussed by the Union prior to the vote were the respondent's refusal to sign an agreement, the apprentice question, and the respondent's proposal that there be no discrimination between union and non-union men.

Duke met C. H. Hoiles directly after the meeting and told him of the Union's decision. When Hoiles told Duke that the respondent had not wished the strike, Duke replied: "We feel that you have wanted it, both you and your father."

The strike began on the evening of April 30, 1941. All the printers walked out on strike that night and the next morning, except the foreman of the composing room.

### 5. The Clovis News-Journal

R. C. and C. H. Hoiles together own a 90 percent interest in a newspaper called the Clovis News-Journal published in Clovis, New Mexico. On July 25, 1939, the Board issued a decision[12] in which it

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(12) In the Matter of R. C. Hoiles, C. H. Hoiles, Harry Hoiles and Mary Jane Hoiles, Doing Business Under the Trade Name and Style of Clovis News-Journal and Pryer C. Smith, 13 N.L.R.B. 1123. A petition for enforcement of the Board's order in this case was filed in the United States Circuit Court of Appeals for the Tenth Circuit; the Court, on August 5, 1940, granted a motion of the Board to dismiss the proceeding without prejudice.

found that the publishers of the Clovis News-Journal, by their refusal to put in writing an agreement they had reached on February 6, 1939, with Local 985 of the ITU, had interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act.

On November 30, 1940, however, Local 985 of the ITU and the publishers signed a one-year agreement providing for a closed shop. C. H. Hoiles is general manager of the Clovis News-Journal and owns a 45 percent interest in the paper. All problems concerning its labor relations are first submitted to him before action is taken.

6. R. C. Hoiles' views on unionism

On January 15, 1941, Duke and R. C. Hoiles engaged in a discussion on trade unions, similar to discussions between the two held in the past. Duke asked: "If you do not like union labor in your employ, why don't you discharge all of us and employ non-union labor." Duke testified and the undersigned finds that R. C. Hoiles replied: "Oh, the Wagner Act and its provisions would force me to reinstate all of them and give them back pay too."[13]

A series of 5 columns written by R. C. Hoiles which had been published in 1940 and 1941 in the Register under his signature was introduced in evidence at the hearing. These columns were offered

(13) R. C. Hoiles did not testify, although present at the hearing.

and received not to show that the views expressed therein were in themselves a violation of the Act, but solely to illustrate the opinions of R. C. Hoiles and thus to furnish a background against which the respondent's contentions in the negotiating conferences could be interpreted and evaluated.[14]

In the May 31, 1940, issue of the Register there appeared a column entitled: "Printers Union Idea of Apprentices." R. C. Hoiles wrote in that column that "the apprentice must be the serf of the union printers" and that "The only difference between the printers' idea of controlling apprentices and Hitler or Stalin, is a matter of degree."

In another column published the same day he wrote:

> Anyone who has had experience in reading union contracts, recognizes the similarity between the German terms of peace to France and a union contract.
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> * * *

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(14) The undersigned rejects the contention of the respondent that there was no connection between these views and the position taken in the collective bargaining conferences by C. H. Hoiles. Not only is R. C. Hoiles president of the respondent and one of its directors, but he is also the father of C. H. Hoiles. Together they own about half of the stock of the respondent and are the co-publishers of the Register. The remaining shares are owned by the wife, son, and daughter-in-law of R. C. Hoiles, and by Earl J. Hanna, not a member of the family. The letter of the respondent dated April 26, 1941, referred to above, was written after a meeting of the directors of the respondent, attended only by R. C. and C. H. Hoiles and their wives.

> The result of union contracts in America that takes away the initiative of workers and robs those excluded from having the right to receive the fruits of their labor, if carried on to its final culmination, will result in as much tyranny in America as exists now and will exist in France.

On January 22, 1941, one week after the discussion with George Duke, above described, R. C. Hoiles wrote in his column:

> The contributor asks why the Register employs union labor in its printing shop. The answer is that union labor and the Wagner law have discriminated against those who do not believe in the closed shop from having the right to learn a trade, and after they do permit them to become apprentices they control the way they are to learn the trade. For this reason printers who believe in open shop are very scarce.

On May 17, 1941, after the strike, R. C. Hoiles in a column entitled "Labor Unionists and Self Respect" wrote:

> Of course, the material loss due to labor unions causes untold misery, suffering and poverty, but the most serious part and the primary cause of all this loss, is the degradation of the character of the men under labor union control. They have had their souls conscripted, their personalities drafted by the racketeers at the head of the unions.

On May 22, 1941, R. C. Hoiles wrote:

> The contention of labor unionists that collective bargaining and labor union tactics raise wage levels is just as rational as it would be for a bank robber to contend that bank robbery raises the standard of living of people.[15]

C. The refusal to reinstate the striking employees; interference, restraint, and coercion.

After C. H. Hoiles' conversation with Duke on the night of April 30, 1941, Hoiles called William Bray into his office, then employed on the night shift. Hoiles requested Bray to come to work the next day and promises him his regular wages plus $1.50 an hour for overtime work. Bray suggested that the respondent might change his mind and sign a contract with the Union in 2 or 3 days, in which event Bray would incur the Union's displeasure. Hoiles replied, according to Bray, and the undersigned finds: "We will not sign up in two or three days and we will never sign with the Union."

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(15) These views of R. C. Hoiles would, of course, be of no materiality or consequence in the absence of unfair labor practices on the part of the respondent. In determining, however, whether the acts alleged to have been performed by the respondent are unfair practices or not, his views serve to interpret equivocal conduct and to furnish a motive, if not an explanation, for the respondent's entire course of conduct. Cf. Matter of Prettyman, etc., 12 N.L.R.B. 640, 646, set aside on question on venue without prejudice, N.L.R.B. v. Prettyman, 117 F. (2d) 786 (C.C.A. 6), where a booklet on labor relations written by a publisher was similarly considered.

Bray then explained that he would be fined $1,000 by the Union if he were to work during the strike. Hoiles offered to take care of any union fine imposed on Bray, but the latter rejected the offer.

On May 1, 1941, R. C. Hoiles, president of the respondent, visited Bray's home and spoke to the latter's wife. Hoiles requested Mrs. Bray to use her influence to get her husband to go back to work. When Mrs. Bray referred to the possibility of a $1,000 union fine if her husband did so, R. C. Hoiles offered to post $1,000 in a bank in escrow to provide for that contingency, and in addition offered to furnish all the money she needed for her immediate use. Mrs. Bray refused. During the conversation, R. C. Hoiles stated that he did not believe in unions and that his self-respect prevented him from taking back the union men.

On May 2 or 3, Duke met C. H. Hoiles, told him the Union was still willing to negotiate with the respondent. Hoiles replied that any time any of the strikers wanted to return to work, he would be considered individually.

On Sunday afternoon, May 4, 1941, R. C. Hoiles visited Bray at his home once more and offered him $40 a week if he returned to work. Bray refused. During the conversation, R. C. Hoiles stated that he had had trouble with the ITU before, which cost him $80,000 and that he would never have anything to do with it.

On May 5, 1941, Clarence Liles, a business agent of the Allied Printing Trades called on C. H. Hoiles and advised him that the stereotypers em-

ployed by the respondent would not pass through the picket line which had been established by the Union.[16] Liles told Hoiles that if the picket line were removed or the printers came back to work, the stereotypers would return to work. Hoiles replied that, so far as the ITU was concerned, they would never come back.[17]

On May 5, one striking printer returned to work and by May 6, 1941, all of the striking printers had been replaced by new employees.

In May 1941, a conciliator of the United States Department of Labor conferred separately with the Union and the respondent and urged both sides to submit the dispute to arbitration. The Union agreed but the respondent refused.

Around July 25, 1941 the Union wrote the following letter to C. H. Hoiles:

> At a meeting of Santa Ana Typographical Union #579, held on Friday, July 25, the following action was taken by unanimous vote:
>
> The union requests a meeting with the Santa Register Publishing Company for the purpose of renewing negotiations and reaching an

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(16) The stereotypers have not yet returned to work and have been replaced.

(17) Edward Saleh, a stereotyper present at the conference, testified that Hoiles replied: "So far as the Typographical was concerned, they wouldn't be back to work." C. H. Hoiles testified that what he had said at the conference was: "What if they never come?" The undersigned, however, credits the Liles-Saleh version, particularly as they had little interest in the outcome of this proceeding.

agreement for the reinstatement of the former union employes of the The Santa Daily Register.

Yours truly,
SANTA ANA TYPOGRAPHICAL UNION
#579
(s) J. W. JONES
President
(s) O. E. FISHER
Secretary.

On August 2, 1941, the respondent replied as follows:

We acknowledge receipt of your letter of recent date which advises us of the action of your Union as of July 25th last.

The Santa Ana Register has never refused to negotiate with you and will not refuse to negotiate with you now. Before sitting down with you, however, we should point out that since your members went out on strike on May 1st last, nearly three months ago, it has been necessary for us to employ others to take the places of those who went out on strike.

These new employees have now become a part of the establishment and we do not feel, in fairness to them, that we can replace them now. Furthermore, shortly after your members went out on strike, we offered, through your Mr. Duke then local President, to take back any of your members who were out on strike,

whom we believed could be utilized if they returned to The Register because of vacancies we had at that time. These men did not return, however, and it was necessary to fill the vacancies by employing others who are now a part of our staff.

On behalf of the Management I also feel it necessary to indicate to you that there has been no change in our situation since the Union and the Management found it impossible to get together on the questions of increased wages and apprentices.

If you wish to sit down with us, in view of what I have written, the Management will certainly not refuse to confer with you. We think it only fair, however, that before doing so you should be given our attitude, as outlined above.

Sincerely,

REGISTER PUBLISHING CO., LTD.

By (s) C. H. HOILES

There was no further communication or conference between the respondent and the Union. None of the eighteen strikers listed in Appendix A of the Intermediate Report has been reinstated.

D. Concluding findings

1. The refusal to sign a contract

Throughout the negotiations, the Union did not withdraw its demand for a signed contract nor did the respondent recede from its position that its word was good enough.

It is, however, well settled that an employer's refusal to reduce to writing and sign an agreement he has reached with a labor organization is a conclusive demonstration of his failure to bargain in good faith and a violation of Section 8 (5) of the Act.[18] And, as was held in N.L.R.B. v. The Blanton Co., 121 F. (2d) 564 (C.C.A. 8): "Equally so, is such an intention, which is announced or has been determined upon before negotiations are commenced."

It is immaterial that when the Union requested a signed contract the parties had not yet reached an understanding as to what would be included in the contract. Nor is it material that despite the respondent's stand in opposition to a signed contract, the Union continued discussing with it the proposed terms of such a contract.[19] Nor is it an answer to this "well-nigh inescapable inference"[20] of bad faith in refusing to sign an agreement, that the respondent would probably have reduced any agreement reached to writing.[21] The obligation that an employer sign an agreement is based not only upon the practical necessity that without a permanent memorial of negotiations they "are exposed to

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(18) Heinz Co. v. N.L.R.B., 311 U. S. 514.

(19) Matter of Montgomery Ward & Company, etc., 37 N.L.R.B 100, 120.

(20) Fort Wayne Corrugated Paper Co. v. N.L.R.B., 111 F. (2d) 869 (C.C.A. 7).

(21) Matter of Chesapeake Shoe Mfg. Co., etc., 12 N.L.R.B. 832, 838.

the sport of fugitive and biased recollection."[22] The Union was entitled to a legally enforcible agreement, not a mere memorandum which would have to run the gauntlet of the risks of authentication and the Statute of Frauds in a court action. The respondent's freedom to contract did not include "the opportunity to put in jeopardy"[23] the fruits of the Union's negotiations.

The respondent was not protecting a real or legitimate interest in this refusal to sign an agreement, but was rather demonstrating its captiousness, particularly in view of the antagonism demonstrated by R. C. Hoiles in his editorial attacks against the Union.

That this refusal was not a matter of principle is indicated by the fact that R. C. and C. H. Hoiles in November, 1940 agreed to a signed contract for the Clovis News-Journal. Despite this, however, in April 1941, C. H. Hoiles still refused to sign a contract insisting that his "word" was good enough. This refusal demonstrates that the respondent was not bargaining in good faith.

2. The proposal for an open shop

The conclusion that the respondent was bargaining in bad faith by reason of its refusal to sign a contract with the Union is buttressed by the counter-proposals submitted by the respondent. In March 1940 the respondent, in reply to the Union's

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(22) Art Metal Construction Co. v. N.L.R.B., 110 F. (2d) 148 (C.C.A. 2).

(23) Ibid.

request for a wage increase, proposed, among other things, that it be given full control of the apprenticeship system and that in the future there be no discrimination between union and non-union men.[24] These two proposals, whatever their merits in the initial negotiations between a publisher and his printers looking toward the establishment of contractual relations, take on a different aspect because of the long-continuing relationship between the Union and the respondent.

Members of the Union had been working on the Register for its various owners since 1909. Since 1928 the respondent and the Union had observed the terms of an oral agreement. Since 1937 the present stockholders of the respondent had been operating the composing room under such an agreement. During all these years the oral agreements provided that all printers employed on the Register were required to be members of the Union.

The respondent did not contend that a closed shop provision would compel it to coerce its employees to join the Union (nor could it, since all were then members); it did not contend that a closed shop provision would prevent or impair the hiring of qualified printers; it did not contend that such a provision would prevent printers from leaving the Union (there was no indication that any

(24) The Union interpreted this latter demand as meaning the elimination of the closed-shop provision of its oral contract; the respondent gave no further or different explanation. The undersigned accepts the Union's interpretation as reasonable and as the one intended by the respondent.

one wished to leave the Union). The respondent, without attempting to justify its position, merely insisted on no discrimination between union and non-union men. No reason at all was advanced by the respondent for this demand in an industry, where, as the undersigned takes judicial notice, the closed shop has been characteristic for many years.[25]

Nor was this demand of the respondent a mere tactical or bargaining move in its negotiations with the Union. The respondent had, through its president, publicly expressed its hostility to the closed-shop principle and had candidly stated that only the Act prevented the discharge of all of its union printers and their replacement by non-union men. The proposal made by the respondent therefore represented a real threat to the Union's security and to the jobs held by its members.

While the closed-shop provision in a contract is customarily the subject of negotiation, and the failure to accept a closed-shop demand of a union is ordinarily not in itself a sign of bad faith,[26] the

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(25) Cf. Monthly Labor Review, October 1939, page 831, published by the Bureau of Labor Statistics; see also Governmental Protection of Labor's Right to Organize, National Labor Relations Board, Division of Economic Research, Bulletin No. 1, August, 1936, page 19, incorporated in Matter of Crucible Steel Company of America, etc., 2 N.L.R.B. 298.

(26) Matter of Montgomery Ward & Co., Incorporated, etc., 39 N.L.R.B., No. 41, 10 L.R.R. 121; Matter of Sam M. Jackson, etc., 34 N.L.R.B., No. 30.

insistence by the respondent upon an open shop in these circumstances, without a showing of its necessity, raised a further doubt as to the respondent's good faith.

3. The proposal for full control of apprentices

The respondent's insistence upon complete control of the apprentices, both as to their number and the type of work performed by them, was on a par with its demand for an open shop. The oral contracts in effect since 1909 and which the present management of the respondent had been observing since 1937 provided in detail for the control of apprentices. Thus, the number of apprentices that could be hired was limited, the type of work they could do was regulated, and the length of the apprenticeship fixed.

The so-called "general laws" of the ITU which are adopted by its annual conventions regulate the apprentice system in great detail. The general laws of the ITU require that contracts of subordinate locals incorporate a section containing the necessary requirements of these laws with respect to apprentices. These laws were, by incorporation, made a part of the oral agreements between the Union and the respondent. The respondent's demand for complete control of apprentices represented a demand therefor that the Union was unable to comply with even if it wished to. [27]

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(27) Knowledge of these laws of the ITU must be imputed to the respondent, for they were part of the oral contract to which it was a party for more than three years.

The respondent, whatever legitimate grievances it had against the apprentice system, was making a demand far broader in scope than required by its own needs. Its oral agreement with the Union limited its apprentices to three, as compared with 22 journeymen, or full-fledged employees. The laws of the ITU, however, provided that the maximum number of apprentices a publisher employing 22 journeymen was entitled to was 5. The respondent, therefore, if it felt the need of more apprentices could in its letter of April 26, 1941, have asked the Union to allow it two more. Instead it asked for complete control without any restrictions.

The apprentice system was firmly embedded in the ITU's relationships with employers and has been so for many decades. Seth Brown, formerly a first vice-president of the ITU, testified that in his long experience with the ITU he had seen numerous contracts with employers, but had never seen one which gave an employer full control of the apprentice system. While, of course, the experience of other employers was not binding upon the respondent, yet such experience may be considered in evaluating the reasonableness of the respondent's proposal.[28]

The apprentice system was of importance to the Union. Allowing an employer full control of apprentices meant the dilution of the journeymen printers

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(28) Similarly, at common law to determine whether an individual has acted negligently, the ordinary standards of other reasonable individuals under like circumstances, are considered, Restatement, Negligence, Sec. 282.

craft and the gradual replacement of journeymen earning $1 an hour by less skilled apprentices earning much less than that sum .That such a possibility was not remote is apparent from the published views of the respondent's president attacking unions in general and the apprentice system in particular.

The respondent's sweeping demand as to apprentices throws further doubt on its good faith in the negotiations with the Union, and indicates it was seeking a break with the Union, rather than a continuance of contractual relationships.

4. The respondent's position on the wage issue

The respondent's position on the wage question, coupled with its contentions on the signed contract, closed shop, and apprentice issues, throws further doubt on its good faith. The Union's first proposal of $1.15 an hour made in March 1940 was on its own initiative modified three times, yet on each occasion the respondent rejected the request and, although solicited, made no counter-offer on wages. [29]

The respondent did not even contend in 1941 that it could not afford the proposed wage increase. It admitted that the increase would not have embarrassed it financially, but argued that granting the printers an increase would have required it to grant

(29) The respondent's proposal that the work week be increased to 40 hours, far from being an effort to meet the Union part of the way, represented a limitation on overtime and a worsening of existing conditions.

similar increases to the other unorganized employees.[30]

The 22 members of the Union employed by the respondent were not, however, required to wait for a wage increase, which the respondent admitted it could grant, until the respondent was able or willing to increase the wages of its remaining 60 odd unorganized employees. Acceptance of the respondent's contention on this point would necessarily mean that an organized unit of an employer's staff could not hope for a wage increase until the entire plant as a whole received one, regardless of the individual merits of the needs of each particular craft or group.

5. The refusal to bargain during the strike

The respondent's offer on August 2, 1941, to meet further with the Union does not indicate a willingness to bargain collectively in good faith, since the crucial issue of reinstating the strikers,[3] was arbitrarily excluded by the respondent from the matters to be discussed. Bargaining about wages and hours would have been a meaningless task, if the strikers for whose benefit the Union sought to bargain were deprived of the fruits of the negotiations. Such "bargaining" would yield little comfort to the striking employees. The strikers were entitled to reinstatement on their request alone, as is hereinafter

(30) The respondent offered no evidence that it would have to give these employees a wage increase if the printers received one, other than the assertion of C. H. Hoiles.

(31) The strike, as is hereinafter found, was caused by the respondent's unfair labor practices.

found, without any negotiation. To refuse even to negotiate on this subject is therefore not a willingness to bargain collectively.

6. Conclusions as to the bargaining negotiations

Viewing the negotiations in their totality, the respondent's announcement that it would not sign any agreement it might reach with the Union; its demand for no discrimination between union and non-union men; its insistence upon full control of the apprentice system; its failure during two years of negotiations to meet the Union even part of the way on the wage issue, or even to suggest a solution, even though a wage increase would not have embarrassed it financially, and finally its refusal to negotiate fully on all issues during the strike, convince the undersigned and he so finds, that the respondent on April 29, 1941, and at all times thereafter refused to bargain collectively with the Union as the exclusive representative of the employees in an appropriate unit, and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. [32]

The undersigned further finds that the strike of April 30, 1941, was caused and prolonged by the above-described refusal to bargain in good faith.

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(32) After the strike began, the Federal conciliator proposed arbitration. While the duty to bargain collectively with a union does not ordinarily entail the obligation to submit to arbitration any matters in dispute, the respondent's refusal and the Union's willingness to arbitrate do indicate in some measure each party's views as to the reasonableness of its position and the likelihood that an impartial third party would agree with these views.

7. The refusal to reinstate the strikers

Since, as has been found, the strike of April 30, 1941, was caused by the respondent's unfair labor practices, the strikers were entitled to reinstatement thereafter on their application, even though by that time their places had already been filled by employees hired after the commission of the respondent's unfair labor practice.[33] The mere fact that the respondent was willing to meet with the Union following the receipt of its request for reinstatement is of no avail to the respondent, since it clearly indicated that it was futile to discuss reinstatement. Its statement: "These new employees have now become a part of the establishment and we do not feel, in fairness to them, that we can replace them now," converted its offer to negotiate into a mere mockery.

In view of the respondent's indication that the strikers' places had been permanently filled by new employees, they were under no obligation to make an additional request for reinstatement which would have been a "useless gesture."[34]

By the respondent's refusal on August 2, 1941,

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(33) Black Diamond S. S. Corp. v. N.L.R.B., 94 F. (2d) 875 (C.C.A. 2); it is immaterial that the strikers did not individually apply for reinstatement in view of the general application made in their behalf by the Union. Matter of Rapid Roller Co. etc.; 33 N.L.R.B. No. 108, aff'd Rapid Roller Co. v. N.L.R.B., 9 L.R.R. 654 (C.C.A. 7).

(34) Matter of Eagle-Picher Mining & Smelting Co., etc., 16 N.L.R.B. 727, modified and enforced, Eagle-Picher Mining & Smelting Co. v. N.L.R.B. 119 F. (2d) 903 (C.C.A. 8).

and thereafter, to reinstate its striking employees, the respondent discriminated in regard to the hire and tenure of said employees, thereby discouraging membership in the Union and thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

8. The effort to induce Bray to abandon the strike.

The efforts made by both C. H. and R. C. Hoiles to induce William Bray to cease his concerted strike activity and to desert the Union interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.[35]

## IV. The effect of the unfair labor practices upon commerce.

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening

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(35) In addition, by "undercutting" in this manner the authority of the Union the respondent thereby violated its obligation to deal with the Union as the exclusive representative of all the employees in the composing room, including Bray. Such conduct also reflects on its good faith in the bargaining negotiations. Ritzwoller Co. v. N.L.R.B., 114 F. (2d) 432 (C.C.A. 7); N.L.R.B. v. Lightner Publishing Corp. 113 F. (2d) 621 (C.C.A. 7); Matter of Montgomery Ward & Co., etc., 37 N.L.R.B. 100, 124.

and obstructing commerce and the free flow of commerce. [36]

## V. The remedy

Since it has been found that the respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the respondent has refused to bargain collectively with the Union as the representative of a majority of the employees in an appropriate unit. It will therefore be recommended that the respondent upon request bargain collectively with the Union.

It has further been found that the unfair labor practices of the respondent caused and prolonged the strike which began on April 30, 1941. In order to restore the status quo as it existed prior to the time the respondent committed the unfair labor practices, it will be recommended that the respondent offer reinstatement to their former or substantially equivalent positions, without prejudice to their seniority rights and privileges, to those employees who went out on strike on April 30 and May 1, 1941, and who have applied for, and have not been offered, reinstatement, dismissing if necessary any persons hired by the respondent after the strike began. It

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(36) Matter of Clarksburg Publishing Co., etc., 25 N.L.R.B. 456, aff'd 120 F. (2d) 976 (C.C.A. 4); N.L.R.B. v. A. S. Abell Co., 98 F. (2d) 951 (C.C.A. 4); Matter of Citizen-News Company, A Corporation and Los Angeles Typographical Union, Local No. 174, 8 N.L.R.B. 997.

will be further recommended that the respondent make whole those employees who went on strike on April 30 and May 1, 1941, and who were refused reinstatement on August 2, 1941, for any loss of pay they may have suffered by reason of respondent's refusal to reinstate them, by payment to each of a sum of money equal to that which he would normally have received as wages from August 2, 1941, to the date of the respondent's offer of reinstatement, less his net earnings,[37] if any, during such period.

The views of R. C. Hoiles on trade unions coupled with the acts of the respondent in the past reveal a purpose on the part of the respondent to defeat the basic purposes of the Act and the rights of its employees to bargain collectively through their own representatives. An order narrowly limited to one type of unfair labor practice may be circumvented or evaded by a different type of unfair labor practice, especially on the part of a respondent who gives

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(37) By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See Republic Steel Corporation v. N.L.R.B., 311 U. S. 7.

grudging assent to the purposes of the Act. In order therefore to make effective the interdependent guarantees of Section 7 of the Act, to prevent unfair labor practices and a repetition of the strike of April 30, to minimize industrial strife which burdens and obstructs commerce and thereby to effectuate the purposes of the Act, the undersigned will recommend that the respondent cease and desist from in any manner interfering with the rights guaranteed in Section 7 of the Act.

Upon the basis of the above findings of fact, and upon the entire record in the case, the undersigned makes the following:

## CONCLUSIONS OF LAW.

1. Santa Ana International Typographical Union No. 579 is a labor organization within the meaning of Section 2 (5) of the Act.

2. All the employees in the composing room of the respondent's Santa Ana plant constituted at all times material herein, and now constitute, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Santa Ana International Typographical Union No. 579 is, and at all times since March 1, 1940, has been, the exclusive representative of all the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on April 29, 1941, and at all times thereafter, to bargain collectively with Santa

Ana International Typographical Union No. 579, as the exclusive representative of the employees in the above-described unit, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of the striking employees whose names are listed in Appendix A of this Intermediate Report, thereby discouraging membership in Santa Ana International Typographical Union No. 579, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

6. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

8. The respondent has not engaged in unfair labor practices by criticizing and condemning unions as rackets and union members as racketeers, by criticizing and condemning the principles of collective bargaining, and by statements that employees are better off without a union and that unions have never benefited anyone.

## RECOMMENDATIONS.

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that

the respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to bargain collectively with Santa Ana International Typographical Union No. 579 as the exclusive representative of all the employees in the composing room of its Santa Ana plant.

(b) Discouraging membership in Santa Ana International Typographical Union No. 579, or any other labor organization of its employees, by refusing to reinstate any of its striking employees, or in any other manner discriminating in regard to their hire or tenure or any term or condition of their employment;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action, which the undersigned finds will effectuate the purposes of the Act:

(a) Upon request, bargain collectively with Santa Ana International Typographical Union No. 579 as the exclusive representative of all its employees employed in the composing room of its Santa Ana plant, in respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an agreement is reached on such matters, upon

request, embody such agreement in a signed contract with the Union;

(b) Offer to the employees whose names are listed in Appendix A of this Intermediate Report, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(c) Make whole the employees whose names are listed in Appendix A of this Intermediate Report for any loss of pay they may have suffered by reason of the respondent's discrimination in regard to their hire and tenure of employment, by payment to each of a sum of money equal to that which he would normally have earned as wages from August 2, 1941, to the date of the respondent's offer of full reinstatement, less his net earnings, as described above in the section entitled "The remedy," during such period;

(d) Post immediately in conspicuous place in its plant at Santa Ana, including the composing room, notices to its employees stating:

(1) That the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a), (b), and (c) of these recommendations;

(2) That the respondent will take the affirmative action set forth in paragraphs 2 (a), (b), and (c) of these recommendations; and

(3) That the respondent's employees are free to become or remain members of Santa Ana International Typographical Union No. 579, or any other labor organization, and that the respondent will not

discriminate against any employee because of membership or activity in that organization.

(e) Notify the Regional Director for the Twenty-first Region in writing within twenty (20) days from the date of the receipt of this Intermediate Report what steps the respondent has taken to comply therewith.

It is further recommended that unless on or before twenty (20) days from date of the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

And it is further recommended that the complaint be dismissed insofar as it alleges that the respondent criticized and condemned unions as rackets, union members as racketeers, and the principles of collective bargaining and by stating to its employees that unions have never benefited anyone and that employees are better off without a union.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended—any party may within thirty (30) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Shoreham Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceedings (including rulings upon

all motions or objections) as it relies upon, together with the original and four copies of a brief in support thereof. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within twenty (20) days after the date of the order transferring the case to the Board.

WILL MASLOW,
Trial Examiner.

Dated: June 11, 1942.

APPENDIX A

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| A. L. Berkland | G. L. Hawk |
| F. L. Berkland | J. W. Jones |
| C. W. Brakeman | L. C. McKee |
| William O. Bray | J. W. Parkinson |
| C. J. Bronzen | J. H. Patison |
| Charles Clayton | J. A. Sherwood |
| G. W. Duke | V. C. Shidler |
| E. W. Ellis | J. E. Swanger |
| W. H. Fields | E. Y. Taylor |

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[Title of Board and Cause.]

STATEMENT OF RESPONDENT'S EXCEPTIONS TO THE INTERMEDIATE REPORT

Comes now respondent, Register Publishing Co. Ltd., and excepts to the Intermediate Report dated

June 11, 1942, of Trial Examiner, Will Maslow, in the following particulars:

## FINDINGS OF FACT

I. The Business of the Respondent

A. Respondent excepts to the findings of fact generally and specifically upon the ground that the National Labor Relations Act is not applicable to respondent. Respondent is not engaged in interstate commerce, as the Examiner has found. Respondent is a local newspaper, gathering and publishing local news items and items of interest to local residents. The fact that the circulation is only fifteen thousand and thirty-two (15,032) Tr. p. 410, 1 through 5) indicates the community nature of the newspaper, and negatives the possibility of anything approaching a metropolitan publication. The fact that only fifty-nine (59) copies were sent outside the state (Tr. p. 410, lines 2 through 5), is another indication that the position of the paper is intra state.

The purchase of equipment, raw materials such as newsprint, and the like, and the inclusion within one's columns of advertising, news, features, stories and comic strips from without the state in limited amounts (Tr. ps. 411 through 413) should not and do not cause an intra state business to become interstate. Western Livestock Co. v. Bureau of Revenue, 303 U.S. 250, p. 258 (1938). Jones & Laughlin Steel Corp. 301 U.S. 1 (1937).

B. The activities of respondent do not have a

close, intimate and/or substantial relation to trade, traffic and commerce among the several states, nor do they lead to, or tend to lead to labor disputes, burdening and obstructing commerce or the free flow thereof. When the National Labor Relations act was passed, one of the underlying purposes was expressed as an effort to eliminate major maladjustments and disruptions in the key interstate industries of the country, and particularly to prevent a strike or labor dispute in one industry from having repercussion upon others. It therefore becomes exceedingly important, in the event of a strike or labor dispute, to ascertain whether or not the business in which the strike or labor dispute occurs, is found by the Board to be within the jurisdiction of the Act. In Newark Morning Ledger Co., 120 F. (2d) 262 (1941), the Court said, at p. 268:

> "The jurisdiction is not to be exercised unless in the opinion of the Board, the unfair labor practice complained of, interferes so substantially with the public rights created by Sec. 7 as to require its restraint in the public interest * * * The Congress has however, reposed in the Board, complete discretionary power to determine in each case, whether the public interest requires it to act. With the appropriate exercise of that discretion, we may not interfere." (underscoring ours)

In the case at bar, the strike was called on April 30, 1941, and all but the foreman and one apprentice went out, and except for them, a journeyman and another apprentice who returned, all the remaining

printers stayed out. The strike has nominally existed ever since. In spite of the above however, the evidence shows positively that there has been no substantial interference with the business of the company, that there were no pickets around the plant for about ninety percent (90%) of the time since December 7, 1941 (Tr. p. 419, lines 24 and 25) and picket lines were not continuously maintained at the entrances to the plant prior to December 7, 1941 (Tr. p. 419, lines 2 through 4, page 420, lines 3 through 6), the strike has not caused respondent to be unable to obtain raw materials (Tr. p. 420 lines 7 through 9); had no effect upon national advertising (Tr. p. 420, lines 10 to 11); had no effect upon featured services (Tr. p. 420 lines 15 through 17); had no effect on news services or the news or information coming from them (Tr. p. 420, lines 18 through 20), had no appreciable effect upon local advertising (Tr. p. 420, lines 21 through 23); had no effect upon circulation (Tr. 420, lines 24 and 25); had no effect upon the small out-of-state circulation (Tr. p. 421, lines 1 to 3); had no effect upon local operations in the plant, except for the short period within which respondent, the week following the strike, had to replace those who were formerly employed and went out on strike (Tr. p. 421, lines 4 through 12), and except for the period of several days after the strike, the strike had no effect upon the normalcy of operations of respondent's plant ( Tr. p. 421, lines 10 through 12) (Tr. 422, lines 6 through 9). The stereotyper did refuse to go through the picket line, another one was hired, and the situation became

normal (Tr. p. 422, lines 10 through 21). The newspaper went to press, and was published and appeared early in the afternoon of May 1st, the day after the strike was called, and there was no stopping of any issue (Tr. p. 429, lines 1 through 19). The May 1st paper was only two to four pages light of a normal issue, although it was put out with a makeshift crew (Tr. p. 430 lines 5 through 11). It will therefore be seen that the strike, except for the first few hours, caused practically no difference in the normal operations in respondent's plant, and that the evidence shows no resulting effect, whether close, substantial, intimate or otherwise by the strike upon the normal business operations of the respondent. The undisputed testimony of the management also shows that the operations of respondent's composing room were as efficient at the time of the hearing, as prior to the strike (Tr. 481, lines 9 through 14). It would appear to be hard to find a case in which a strike had less effect, either upon the operations of the respondent, or upon the surrounding community, than that in the case at bar. In N.L.R.B. v. Fainblatt, 306 U.S. 691 (1939) at p. 608, the Supreme Court of the United States stated:

> "In this, as in every other case, the test of the Board's jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of the relationship of employer and his employees, to the commerce, such that, to paraphrase Section 10 (a): 'in the light of the constitutional limitations, unfair labor

practices have led to, or tend to lead to a labor dispute, burdening or obstructing commerce' ".

Under such a test, this respondent should not be held to be within the Act. Furthermore, the Examiner in his report (Page 2, lines 33 through 37), seems to indicate that news comes directly to respondent from without the state, and likewise outgoing news goes directly from respondent's plant to out of state points, whereas the evidence shows that the news comes to respondent from either the Los Angeles or the San Francisco office of the Associated Press (Tr. p. 430, lines 18 through 22), and that news from respondent is collected by one of respondent's employees who also acts as Associated Press agent in the plant (Tr. p. 430, lines 23 through 25) (Tr. p. 431, lines 1 through 5); that the news collected is wired merely to the Los Angeles or San Francisco office of the Associated Press, and there is no outside connection with the out-of-state offices of the Associated Press (Tr. p. 431, lines 6 through 21).

In cases where the business of the company is so inherently intra state, control over the labor relations of such should be left to the applicability of the state law, and in this case, to the laws of California (See Franz Daniels, etc. et al vs. Table Linen Supply Company, et al, decided by the California Superior Court of Los Angeles County on April 23, 1942, reported in Commerce Clearing House, 5 Labor Cases, Sec. 61,047, where the Superior Court through Mr. Justice Willis, held that

the discharge of employees because of their union membership and activities, all violate the public policy of the State of California as declared in Sec. 923 of the California Labor Code, and that a court of equity unaided by any other specific statutory authorization may, in the interest of substantial justice, and to protect the employees' freedom of organization, require the reinstatement of such employees with back pay from date of discharge, less unemployment compensation benefits). It therefore appears that there is ample protection under existing California law, even in the absence of a little Wagner Act in California.

Santa Cruz Fruit Packing Co. vs. N.L.R.B. 303 U.S. 453 (1938), at p. 466 and 467, again restates the rule, that the effect upon interstate commerce is the controlling factor, and not the origin of the raw materials or the place where the products are sold.

In determining the effect upon interstate commerce, the burden of proof rests upon the Board, to establish that there is an effect upon interstate commerce, as well as that of proving the other allegations in the complaint. N.L.R.B. v. Express Publishing Co., 111 F. (2d) 588-589; Kansas City Power and Light Co. v. N.L.R.B., 111 F. (2d) 340, at 347, 348, 349 and 351; Burlington Dyeing and Finishing Co. v. N.L.R.B., 104 F. (2d) 736 and 739.

In determining the jurisdiction or lack of jurisdiction in the case at bar, it is of course necessary to keep clearly in mind the tremendous distinction between it and such cases as N.L.R.B. vs. Abell, 97

F. (2d) 951, Associated Press v. N.L.R.B., 301 U. S. 103, and N.L.R.B. v. Hearst, etc. 102 F. (2d) 658, in which cases the employers were engaged in vast enterprises, extending not only to other cities, but to foreign countries as well, and where any strike or labor dispute was bound to have a substantial effect upon the interstate commerce, both by reason of the fact that these enterprises were actually engaged in interstate commerce, and also because the effect upon interstate commerce from such labor dispute was at once evident from the very nature of the operations involved. The contract between the vast operations described in these cases and the local community and intra state operations in the case at bar, is signifiacnt, and should not for an instant be overlooked.

II. The organization involved.

No exceptions.

III. The unfair labor practices.

A. Preliminary.

Respondent excepts, generally and specifically, to the findings of the Examiner, upon the ground that the Board has failed to prove the unfair labor practices charged in the complaint, and as alleged by the Examiner in his intermediate report. In this connection it should be kept in mind that the burden of proof rests upon the Board, as alleged in discussing the question of jurisdiction. In sustaining its burden of proof, it is incumbent upon the Board to show by substantial evidence, that there have been unfair labor practices engaged in by respondent,

and a mere scintilla of evidence is not sufficient. As was stated in N.L.R.B. v. Thompson Products, Inc., 97 Fed. (2d) 13, at page 15 (1938): "The rule of substantial evidence is one of fundamental importance, and is the dividing line between law and arbitrary power." In that case, the Court also stated that a finding of the Board not based upon substantial evidence, tends to destroy the purpose of the act, in that it gives rise to discord between the employer and employees, instead of creating harmonious relations between them. Also see Consolidated Edison Co. of New York, et al v. N.L.R.B. 59 Supreme Court, 206, at 216 and 217 (1938), and N.L.R.B. v. Columbia Enameling and Stamping Co. Inc. 306 U. S. 292 at 299 and ff. (1939).

B. There was no refusal to bargain with the Union.

1. The appropriate unit.

No exceptions.

2. Representation of a majority in the appropriate unit.

No exceptions, except respondent denies that the Union is now the designated representative of a majority of its employees in the composing room, or that the strike has continued ever since April 30, 1941, so far as being actively prosecuted since that date.

3. 1940 negotiations.

Respondent excepts to the Examiner's findings generally and specifically, and in particular because the 1940 negotiations resulted in what amounted to a mutual agreement to continue in effect for an-

other year, the verbal contract under which respondent had been operating since 1937, as the Examiner admits on page 6, lines 9 through 12. Therefore, any unfair labor practices, if they had existed, which is denied, were merged in the agreement to continue on the same basis. The best evidence as to the relationship between respondent and the Union up to the 1941 negotiations is indicated in respondent's Exhibit "1", dated April 3, 1941, being a letter to Mr. C. H. Hoiles, Business Manager and Labor Relations Executive for respondent, by the Union, through George W. Duke, President, which ended as follows:

> "The cordial relations existing between yourself and the Union men in your employ should give you great satisfaction in these days when there is so much strife between employers and employees. We trust that this feeling of partnership may continue and be strengthened."

In face of this declaration by the Union, in requesting a reopening of negotiations in April, 1941, and in face of the fact that agreement had been reached in 1940 to continue the existing agreement, respondent does not believe that a finding that any unfair labor practice took place in 1940, is justified.

At the trial, Respondent's attorney objected to the introduction of evidence as to the 1940 negotiations, but such objection was overruled by the Examiner (Tr. p. 20, lines 5 through 25,—page 21, 1 through 5).

4. Negotiations in 1941 and generally.

Respondent excepts generally and specifically to

the Examiner's findings, and particularly to the finding that there was a failure on the part of respondent to bargain in good faith.

The Examiner has set forth in his report, a number of meetings both in 1940 and 1941, showing unmistakably that actual negotiations were conducted between the Union and respondent. That at these meetings, the various points of difference were discussed and re-discussed, that counter-proposals were made by the management as to matters deemed important to it, and that in the 1941 negotiations, when adverse conditions were already facing the employer, it offered first verbal and then written counter-proposals on matters which the negotiations showed to be of the utmost importance to it. There is no evidence in the record that respondent at any time either refused to meet with the Union or refused to bargain with it or its representatives. On the contrary, the record does show that the respondent never refused to meet with the Union, as shown by the undisputed testimony of C. H. Hoiles (Tr. p. 444, lines 13 through 15) (Tr. p. 146, lines 23 through 25) (Tr. p. 147, lines 1 through 10) testimony of Seth Brown, International representative of the International Typographical Union.

Respondent particularly excepts to the failure of the Examiner to take into consideration or to give due weight in his deliberations to much evidence strongly substantiating a conclusion directly contrary to that of the Examiner, and further establishing that there was unmistakably a genuine negotiation between respondent and the Union, in

which there was a very definite and crystallized conflict of interest and viewpoint to such an extent that respondent could not have come to agreement with the Union except upon yielding to the terms demanded by the Union. It would be the necessary corollary to the Examiner's finding if carried to a logical conclusion, that unless an employer did actually yield to the Union, he would be found guilty of an unfair labor practice in refusing to bargain collectively in good faith with the Union. What the Examiner has failed to discern, is the difference between a proposal on the part of the management concerning something which is in reality of no interest or moment to the employer and is interposed merely as a means of thwarting the Union, and the proposal by an employer of something which is vitally important to it, regardless of whether it meets with favor by the Union or not, which is identical with the situation in the case at bar. Furthermore, the Examiner apparently takes the position, through his comment on page 5, lines 6 through 9, that regardless of the justification, the employer is guilty of refusing to bargain in good faith if he seeks to better his own position in negotiation, if as is inevitable, this would result in what the Examiner calls a "worsening" of the then existing conditions of his employees. It should be remembered that the tide of labor relations and labor negotiations, ebbs and flows according to the conditions which surround the industry and the particular business at the time, and also depends in part upon the economic and strategic position of

the parties. This the Examiner has utterly failed to take into account, with the result that when respondent asked for an analysis of clauses in the verbal agreement which worked oppressively upon him, for example an insufficient number of apprentices, the Examiner could draw but one conclusion, and that was that the Respondent was not bargaining in good faith.

In reaching his conclusions, the Examiner neglected to give due consideration to the realistic situation confronting the Respondent, at the time of the negotiations in 1941. He did not consider important, the fact that respondent was paying wages, admitted by the Union to be those equal to respondent's competition, nor did he draw a sufficient distinction between wages to be paid in a commercial shop and those on a daily newspaper. Judging from the Examiner's report, there was to him only one way in which wages could be changed through negotiations, and that is upward, and only one manner in which any clauses in a labor contract could be changed, and that is in favor of the Union. However true this may be generally, it is not an infallible rule, and one must take into consideration the condition of the industry and ascertain whether its revenues are increasing or decreasing. As will be shown later, revenues were decreasing for respondent. It is not the concern of these exceptions, nor should it have been the concern of the Examiner in his report, to attempt to determine upon the merits, whether the Union or Respondent was correct in its position. What is important is

whether or not each party was bargaining in good faith, proposing and demanding with sincerity, concessions believed by it to be essential to a proper contract between the parties. If this was done, there was bargaining in good faith, even though one or both the parties may have been extremely partisan, selfish, and perhaps clearly unjustified in the position taken. Is the Examiner in a position to state unequivocally from the evidence, that respondent could not have been justified or in good faith, in advocating maintenance of the hourly rate of wages, but increasing the number of hours from 37½ to 40 per week, and in demanding that it be given a greater number of apprentices at a time when it was permitted to have two less than the International Typographical Union general rules provided, and that it be given greater flexibility in its shop by having apprentices permitted to work on machines before the sixth year, when Seth Brown, the International representative of the International Typographical Union, stated they could have learned to operate the machines years before the sixth year. Unless the Examiner is himself justified in stating that respondent could not have been justified and in good faith in advocating these proposals, at a time when the barometer of national advertising showed a present and anticipated decline in such advertising, then his finding a refusal to bargain in good faith is without adequate foundation and in reality constitutes an attempt by him to substitute his judgment for that of respondent in two matters of extreme importance to it.

The position of respondent was that it had what was in certain respects, an unsatisfactory written but unsigned contract with the Union, and that it was willing to grant increased weekly wages if it could secure more work from its employees in the composing room, and if at the same time it could correct certain provisions deemed by it to be unfair with regard to apprentices. The Examiner fails to appreciate the difficulties of operation which confronted respondent, and draws the conclusion that the relief which it sought in the negotiations from the apprentices' clause in the existing written unsigned contract, involving matters of great importance to it, was a red herring drawn across the path of the negotiations for the purpose of thwarting the Union, which is an inaccurate and unjustified conclusion. Further, it is significant that when the final communication, under date of April 26, 1941, was prepared and sent to the Union by respondent, setting forth the final position of respondent in the April, 1941 negotiations, nothing was said with regard to unwillingness to sign a contract, and it should be remembered that this letter, Board's Exhibit "7", was a letter which came after the matter had reached a stage where Mr. C. H. Hoiles had formally placed the status of the negotiations before the Board of Directors, and where the letter in question was signed by the Corporation itself, through its Secretary and Treasurer, as it so states upon the Exhibit, rather than by him individually, as Public Relations *office* of the company. Mention is made of this now, because of the great stress laid

by the Examiner upon the fact that C. H. Hoiles expressed unwillingness to sign a contract. In this connection it should be borne in mind, first, that at no time during the 1940 and 1941 negotiations, was an agreement ever reached upon what terms would be put in a written contract, and second, that by the terms of respondent's counter-proposal of April 26, 1941, the expressed unwillingness to sign a written contract had been dropped, as had the other demands of respondent, except those pertaining to wages and apprentices. It is apparent therefore, that the management had made substantial concessions in this offer by yielding with regard to its various other demands in matters of importance to it.

Can it be fairly stated that the respondent was unreasonable in believing that any wage increase in its composing room should in fairness be also given in like manner to other employees within its plant, whether organized or not? Otherwise respondent would in effect, be discriminating against such other employees in favor the the members of the Union (Tr. p. 134, lines 1 through 7). Was respondent unreasonable in believing that it should not pay wages which were higher than its competition, namely, other similarly situated daily newspaper with which it had to compete in its business (Tr. p. 121, lines 2 through 10)? Can we say that respondent was beyond the bounds of reason in asking for improvement in the operation of its composing room, which could be brought about to increase the efficiency of its plant, without at the

same time injuring its employees, such as increasing the number of apprentices to such an extent as to properly personnel the shop, even under International Typographical Union rules (Tr. 102 lines 6 through 16), and permitting apprentices to work on machines before the sixth year, which even by Union testimony they were able so to do (Tr. 130, lines 2 to 24)? That the apprentice might also be benefited by an acceleration of his training on the machines, apparently was never contemplated by the Examiner, or that having more men in a shop, capable of operating the machines would give the shop more leeway and flexibility, also had no appeal to him (Tr. p. 130, line 25, and 131 lines 1 to 3).

What fair-minded person can fail to draw the conclusion that there was unmistakably an honest difference of opinion, as well as a direct conflict in interest, between the Union and the Respondent during the negotiations, ending in the April 30, 1941 strike? If this be the case, and it is hard to see how this can truthfully be denied, then a holding that respondent has been guilty of unfair labor practice in fighting for its conviction and best interests, is in reality to determine that unless the employer invariably yields to the Union demands, he is always going to be put in the position of having committeed an unfair labor practice, and the Examiner, the Board or the courts are in reality substituting their judgment as to what is important, for that of the employer.

Categorically further excepting to the Exam-

iner's report with reference to the April, 1941, counter-proposal by respondent as to wages, the Examiner seems to believe that respondent was under an obligation to make a further offer when the Union requested it, but the answer is that C. H. Hoiles had come to the conclusion that no increase in the hourly rate was justified, and certainly it is not an unfair labor practice to continue to adhere to his own conviction in that regard. The letter of April 29, 1941, from Respondent to the Union, it is true, merely repeated the wage counter-proposal of the management, given in an earlier negotiational meeting during that month, but as has already been stated, this represented the fixed conviction of the management that the hourly rate should not be increased, and in fact constituted a withdrawal by respondent from its position with regard to all other matters except with regard to wages and apprentices.

That this was understood by the Union, is apparent from Seth Brown's told with C. H. Hoiles the following afternoon, on April 30, when he made no mention of former differences, which he considered settled by the letter, including respondent's previously expressed refusal to sign a written contract. Seth Brown told C. H. Hoiles that "apprentices" was the stumbling block, and the Union could not accept respondent's proposal with regard to apprentices, as it violated the general laws of the International Typographical Union. However, examination of the latter does not disclose that they prevented acceptance of the respondent's proposal,

or were violated by it, since the Union knew that the two things meant by "complete control of the number of work of our apprentices" were increasing the number of apprentices, and putting them to work on the machines prior to the sixth year, which Seth Brown testified were the two subjects in controversy (Tr. p. 135, line 25, page 136, lines 1 through 3). Section 13 of the International Typographical Union laws were referred to by Mr. Brown as being the section which prevented the work of the apprentices on the machines prior to the sixth year, and Section 13 reads:

> "Arrangements should be made to have apprentices during the sixth year, instructed on any and all type-setting and type-casting devices, in use in the offices where they are employed."

(tr. p. 98, lines 1 through 9). Asked if there was any clause which states that apprentices cannot be trained until the sixth year, Mr. Brown answered that he could not give any specific reference (Tr. 98, lines 15 through 17). It will be seen therefore, that the Union's position was actually not prohibited by International Typographical Union laws, and certainly the increase in number of apprentices from the three then permitted to respondent, to the five permitted under International Typographical Union laws, was not a violation of International Typographical laws, (Tr. 102—6 through 16) (Tr. p. 101, lines 1 through 11), showing that up to the strike of 1941, that respondent had twenty-two (22) journeyman printers, and three (3) apprentices.

Even if the Union had not known the proper interpretation to place upon respondent's demand for complete control over the number and work of apprentices, since Mr. Brown testified that there could be a contract without the consent of the International Typographical Union (Tr. p. 96, lines 15 through 18), it would have been possible to have such a contract between the Union and Respondent.

It is also significant that the Union has not taken the position that respondent did not actually desire the concessions it was asking as to apprentices, or that respondent did not feel that these concessions were highly important to it, indicating that the Union did not take the position that the proposals were not put forth in good faith.

Seth Brown testified that the specific provision in respondent's last counter-proposal which caused the difficulty, was that relating to apprentices (Tr. page 84, lines 6 through 16), so that it seems to be a fair inference from his testimony that it was the counter-proposal with regard to apprentices which actually brought on the strike.

George Duke, President of the Union, testified that refusal to sign a contract was discussed at the Union meeting on April 30, just prior to the strike vote being taken, but he does not testify that the previous refusal to sign a contract was a cause of the strike, although he mentioned it as one of the differences between respondent and the Union (Tr. p. 226, lines 16 through 25, and 227, lines 1 through 11). Respondent therefore excepts from the apparent indication by the Examiner, that respondent's

previous refusal to sign the agreement, was actually the cause of the strike.

With reference to the Examiner's paragraph on page 7, lines 40 through 43 of the Intermediate Report, it should be pointed out that in answer to the remark by George Duke on the evening of April 30, after the strike vote had been taken, Hoiles said:

> "I want you to know that R. C. and I have not wanted this thing."

(Tr. p. 229, lines 2 through 4), he also had told Duke on the preceding Saturday that he, too, hoped that the Union and Respondent could come to an agreement (Tr. page 226, lines 3 through 5).

In an attempt to follow categorically the outline of the Examiner's intermediate report, certain testimony, comments and argument have been placed under the foregoing heading, rather than later in the exceptions, and it is requested that they be considered in connection with the Examiner's heading entitled "D"—Concluding Findings."

5. The Clovis News-Journal.

No exceptions.

6. R. C. Hoiles' views on Unionism.

The evidence in the record is undisputed, that C. H. Hoiles had complete control of labor relations of respondent, and not his father, R. C. Hoiles (Tr. p. 466, lines 23 through 25, 467, lines 1 and 2). Therefore, R. C. Hoiles' views, as expressed in editorials, are not material to the case, and since not

considered evidence of unfair labor practice by the Examiner, by his own statement and ruling, need not be discussed in these exceptions. The record already contains (Tr. pages 386 through 397, line 2), a discussion before the Trial Examiner with regard to this subject.

It might be pointed out, however, that one of the articles referred to by the Examiner, was written May 31, 1940, nearly a year before the strike, one on January 22, 1941, more than two months before negotiations commenced in 1941, and more than three months before the strike, and the other two editorials were written in May 1941, following the strike. The editorials were not shown to have been written with any attempt to influence, restrain or otherwise interfere either with any negotiations, none of which were taking place at the time, nor with the Union or its members, nor was it shown that they had any such effect, except that it was testified that some of the Union members resented them.

With regard to the conversation between R. C. Hoiles and George Duke on January 15, 1941, it appears to have been one of a number of informal talks which had taken place over a period of years, where ideas were exchanged, and where only a small part of what was said, was quoted. The remark of Mr. Hoiles was not alleged to have been made to interfere with, restrain or coerce either the employees or the Union, and there is no evidence that it did.

In this connection, respondent excepts to the

footnote 14, of the Examiner, in holding that there was a connection between the views of R. C. Hoiles, and the position taken in collective bargaining conferences by C. H. Hoiles. However, if, as the Examiner seems to believe, there is any connection, it would at once be apparent that the management had deep convictions with regard to the subject of apprentices, and felt that the situation as existed under the written unsigned contract of 1937, involved abuses which respondent believed very strongly should be rectified.

C. The refusal to reinstate striking employees; interference, restraint and coercion.

Respondent excepts to the Examiner's report under this heading in the following particulars:

C. H. Hoiles did not, according to the evidence, call William Bray into his office (Tr. p. 322, lines 17 through 25). The conversation which he had with him, took place after the calling of the strike, and it is significant that the alleged remark of C. H. Hoiles that the respondent would never sign up with the Union, curiously was not elicited until the re-direct examination of Mr. Bray, who though having discussed the conversation with Mr. Hoiles on direct and cross-examination, made no mention of this remark until re-direct*ion* examination, and then only after a leading question put to him by the Attorney for the Board, over the objection of the Attorney for respondent.

The talk which R. C. Hoiles had with Mrs. Bray

at her home on May last, also took place after the strike.

C. H. Hoiles' talk on May 2nd or 3rd with George Duke, is important in showing the willingness of respondent to take back any of the strikers who wanted to return to work, and whose services could be utilized in the vacancies then existing, before these vacancies were filled by permanent replacements. The letter of the respondent, under date of August 2nd, 1941, Board's Exhibit "8", also states the offer through George Duke, President of the local Union, to take back Union members who were out on strike, who could be utilized if they returned to work because of the vacancies existing at that time. It will be seen therefore, that from the very start, respondent was willing to take back the strikers, all of whom belonged to the Union, but that with two exceptions, the men did not come back.

When the Examiner, in determining whether the remark of C. H. Hoiles alleged to be made to Clarence Liles and Edward Saleh was as stated, accepts their variation instead of that of C. H. Hoiles, upon the ground that Liles and Saleh had little interest in the outcome of the proceeding, he neglected to recall that the evidence showed that Clarence Liles was President and Business Agent of the Allied Printing Trades Council (Tr. p. 358, lines 23 to 24) (Tr. 377, lines 11 and 12), and that Saleh was not only a member of, but Secretary of the Stereotypers Union, one of the Unions which was closely associated with the Typographical Union in the Allied

Printing Trades Council (Tr. p. 375—lines 4 to 5, and 349, line 19). Liles testified that at that conference, C. H. Hoiles spoke in a very low and very friendly voice (Tr. p. 352, lines 1 through 5), that when he said the Typographical Union boys would "never come back", he didn't say it in a threatening tone (Tr. 352, lines 18 through 23), that C. H. Hoiles expressed no unfriendliness about the Typographical Union to Liles (Tr. ps. 353, lines 24-25, 354, line 1 and 2), that C. H. Hoiles didn't use the words "wouldn't let them" come back (Tr. p. 355, line 4); that no remark of anger or disparagement against the Typographical Union was made by Hoiles to Liles (Tr. p. 355, line 8 through 13), that Liles "left Mr. Hoiles very pleasant," when he walked out of the office (Tr. p. 355, lines 13 and 14), that the Typographical Union has no signed contract with respondent (Tr. p. 355, line 24), and that the Stereotypers have worked for Respondent under Union conditions for something over twenty (20) years (Tr. ps. 355, line 25, 356, lines 1 through 4).

When the Examiner states that the Union agreed to submit the dispute to arbitration in May, 1941, at the behest of the conciliator of the United States Department of Labor, Examiner neglects to state that the past history with regard to arbitration as to disputes between these two parties had been that the Union was agreeable to arbitrating only the question of wages, and not other matters in dispute (Tr. p. 133, lines 14 to 16, and lines 22 to 25). Obviously, if Respondent could not have included in the arbitration, things which were important to it, it

can be readily seen why it did not become enthusiastic about arbitration.

In answer to the Union's letter of about July 25, 1941, to C. H. Hoiles, requesting a meeting with respondent "for the purpose of renewing negotiations and reaching an agreement for the reinstatement of the former Union members of the Santa Daily Register," Respondent's letter of August 2, 1941, did not refuse to meet, and set forth in its letter the fact that only after it had offered in May, shortly after the strike began, to take back employees who had gone out on strike, did it then bring in other employees to fill vacancies which necessarily had to be filled. Here again the letter states that the reasons as to why the Union and the management found it impossible to get together, were increased wages and apprentices, with no mention of any refusal to sign a written contract. The Examiner seems to believe that instead of being honest and fair with the Union in telling it that the respondent had not changed its position and had been forced to employ and had employed certain men to work its composing room, that it should have been cagey in not letting the Union know respondent's position and in not stating that it actually had employed certain people necessary to put out the paper. It will be unfortunate if such a view prevails, and will not be conducive to sincerity, honesty and fair dealing between Unions and employees, if employers are forced to say one thing when they mean another, to avoid being charged with unfair labor practices. When the Union em-

ployees walked out on strike in respondent's plant, and respondent after talking with the President of the Union a day or two later, offered to bring back the men individually before their positions were filled, and this offer was refused, there was nothing else that respondent could do but either employ others to do the work, or close its plant. Naturally, printers would be reluctant to go to work under such conditions, unless they were assured of reasonably permanent employment. In this connection, one turns to the remark of Edward Saleh, the stereotyper (Tr. p. 377, lines 18 through 21), where he testifies "Mr. Liles was explaining our situation to him (Hoiles), that in all probability the Union would order us not to go through the Typographical picket line, for our own safety as much as for anything else." From this it can be seen that the average printer coming to work might have reasonably anticipated trouble which fortunately did not result, and he could hardly be expected to be induced to come to work unless some sort of permanency was assured him. It is to Mr. Hoiles' credit that he tried to obviate the necessity for permanent replacements by going to Mr. Duke first and offering to bring back the former employees. Certainly he should not be penalized later, for having made this offer before it was necessary to make permanent replacements in the positions made vacant by the strikers.

D. Concluding Findings.

1. The refusal to sign a contract.

Respondent excepts in a number of particulars to the findings of the Examiner in addition to the reasons already given. What the Examiner has to say about an employer's refusal to reduce to writing and sign an agreement which has actually been reached with a labor union is true, but there were several strong, differentiating facts in this case. The first, of which mention has already been made, is that at no time did the parties ever agree upon what should be put into the contract, so that what the respondent might do in such an event was in reality a moot question. It is not immaterial as the Examiner finds, that no understanding has been reached as to what would be included in the contract, and on the contrary it is exceedingly material that the parties were never in the negotiations leading up to the strike in 1941, of one mind as to the provisions to be included in such a contract. Another differentiating factor here, was that respondent had lived up to the written but unsigned contract of 1937, in the same manner as if the contract had actually been signed (Tr. p. 136, 8 through 20), respondent's Exhibit "1." It is true that Mr. Brown qualifies his testimony, but if there had been any real battles between the Union and the respondent over the contract, there is no question but that they would have been brought out at the trial. In the third place, it should be taken into consideration that the past history of this paper was one of unsigned agreements, and whatever the legal nicety may be, it is perfectly understandable to the layman that the Hoiles resented any infer-

ence that their word was not as good as that of the former owners who had not had a written contract with the Union. The fact that R. C. and C. H. Hoiles, in November, 1940, agreed to a written contract for the Clovis News-Journal was indicative that they were not absolutely opposed to a written contract, and was consistent with their unwillingness to sign a contract in Santa Ana if the basis of the demand was that their word was not as good as those who had formerly owned the paper. That their word was good, and that their commitments were kept, is illustrated by the testimony of Mr. Liles already referred to, that the Stereotypers Union had been in the plant for over twenty (20) years, under satisfactory relations with the management, and yet without a written signed contract (Tr. p. 355, lines 22 through 25, page 356, lines 1 through 4). Respondent would find itself more in accord with the Examiner's findings in this connection, if it did not believe that the essence of the Examiner's finding of unfair practice was not that it said it would not sign an agreement, but that in fact it refused to yield to the Union's demands on the essentials of such an agreement. That appears to be the real basis for the finding of unfair labor practice on the part of the Examiner. Yet the Courts have held that it is not the function of the National Labor Relations Board, nor of the Courts themselves to force an agreement upon the parties to a labor negotiation, providing they negotiate in good faith. See Wilson & Co. Inc., v. National Labor Relations Board, U. S. Circuit Court of Ap-

peals, 8th District, 3 Labor Cases, page 60,167 (1940); H. J. Heinz Co. vs. National Labor Relations Board, U. S. Supreme Court, 3 Labor Cases page 51,107 (1941). In the Heinz case, the Court stated:

> "It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement. But it does not follow . . . that, having reached an agreement, he can refuse to sign it . . . The freedom of the employer to refuse to make an agreement, relates to its terms in matters of substance, and not, once it is reached, to its expression in a signed contract . . . "

These words, which are in the same tenor as those used in the Wilson case, show a definite distinction between the obligation of the employer to reduce to writing and sign a contract after the terms have been agreed upon between the parties, and the freedom of the employer by which he may refuse in good faith to agree to be bound by the proposed terms of a contract with which he is not in accord. In the case at bar, respondent never agreed with the Union upon two essential clauses of the contract relating to wages and apprentices, and in the absence of such agreement, the Union never asked respondent to reduce remaining provisions to written contract form and to sign such a written contract. Of course the Examiner is correct in stating that if there had been an agreement, which there

was not, there was no real or legitimate interest to be protected by not executing the contract, but this argument falls to the ground when no agreement was reached, as in the case as bar. The Examiner is also correct that the Union is entitled to a legally enforceable agreement, and not a mere unsigned memorandum, and that the Union is entitled to have a legally enforceable document, but here again this presupposes the existence of a meeting of the minds, and an accord on essential clauses, which was not present in the case at bar. Therefore, it should not be deemed to be an unfair labor practice if the respondent indicated early in the negotiations that it was unwilling to do what the law required it to do in the event an agreement was reached, when in fact the testimony shows that the contingency of an agreement was never reached.

Equally important in this connection moreover, is the fact that in the management's final counter-proposal, it withdrew from its former position, and yielded to the Union on a number of disputed points, including its former unwillingness to sign a written contract. The testimony of Mr. Seth Brown has already been referred to above, and need not be repeated here, except to comment that the cause of the strike was the position taken by the management in its final counter-proposal of April 26, 1941, on the question of apprentices. Had the offer of the management as contained in that letter of April 26, 1941, been accepted, the agreement would then have included the Union's version of all other disputed questions, and the Union

would be entitled to believe that the management had agreed to reduce these to a final written form as a contract, and to execute the same. Consequently, any possibility of the existence of a continuing unfair labor practice, which might have been deemed to be the cause of the strike, if there is any basis for such an assumption, disappeared when the respondent withdrew from its position and offered to enter into an agreement with the Union on the Union's terms, except for apprentices and wages, and thereby in effect respondent agreed to reduce the entire matter to writing in the form of a contract, and to execute the same.

2. The proposal for an open shop.

This proposal appears to have been more seriously urged early in the negotiations, than toward the close of the same, and was advanced in March, 1940 negotiations which were merged in the agreement to continue for another year with the written unsigned contract of 1937. It is true that the provisions of the latter called for a closed shop. The Examiner in his findings, seems to think there is something unholy or unclean in believing in an open as contrasted with a closed shop, and certainly respondent should not be penalized merely because it did not during the negotiations give each and every reason as to why it preferred an open to a closed shop. There is some question as to whether the proposal, which was that there should be no discrimination between Union and non-Union, was actually advanced by respondent as an open shop proposal. However, even if such was the case,

the Examiner was not in the opinion of the Respondent, justified in finding the advocacy of such a proposal to be evidence of an unfair labor practice, as a failure to bargain collectively in good faith. Again, respondent believes that the views of R. C. Hoiles should not be attributed to C. H. Hoiles, who negotiated for respondent, but the editorial utterance of R. C. Hoiles certainly did express on his behalf at least a sincere and deep-seated hostility to the closed shop, as embodied in contracts such as in the written unsigned contract of 1937, which was renewed in the spring of 1940 for another year, and which was in effect at the time of the April, 1941 negotiations. A closed shop is, as the Examiner stated, customarily a subject of negotiation, and the mere fact that Mr. C. H. Hoiles did not spell out each and every reason why the management desired something other than a closed shop, particularly in the absence of any request from the Union for such an explanation, should not constitute evidence of unfair labor practice. With the controversy raging throughout the country, over the merits and demerits of open shop and closed shop, it would be indeed the view of an extremist that an advocate of some modified plan whereby there is no discrimination between Union and non-Union men can without more be conclusively found to be indulging in unfair labor practices.

3. The proposal for full control of apprentices.

In its discussion in the 1941 negotiations, respondent has taken up in considerable detail, its proposal

for control of apprentices. Reference is made to the citations and arguments set forth as having a distinct bearing upon this subject. It is to be clearly kept in mind that there had long been a controversy between respondent and the Union as to the number of apprentices which respondent should have in its composing room; that inasmuch as it had twenty-two (22) journeymen there, and the International Typographical Union laws provided for one apprentice for every five journeymen or fraction thereof, respondent would have been entitled under I.T.U. laws, to have five (5) apprentices, and yet it was limited by the 1937 agreement to three (3) apprentices, with which arrangement it was exceedingly dissatisfied; that there had been considerable discussion and dispute in the past over the refusal on the part of the Union to agree that the apprentices might be taught to work on the machines prior to their sixth year, whereas, as has been stated, Seth Brown testified they could learn to do so in two or three years, and notwithstanding that, Jane Hoiles, the daughter of R. C. Hoiles, at about the same age as the apprentices, came in and performed satisfactory work upon one of the machines during the summer of 1939 while on a vacation from school, and her work was good enough to use in the production of the paper, although she had no previous experience, and that there was an apparent shortage of machine operators in respondent's composing room which would have been remedied in part, if not entirely, had respondent been permitted to employ two more apprentices

and put apprentices generally on the machines prior to their sixth year apprenticeship. It is only by considering the wide divergence of opinion between the Union on the one hand, and the respondent on the other, that one can reconstruct the extreme conflict in viewpoint relating to this subject, about which even one of the Union negotiating committee, Patison, chairman of the chapel in respondent's composing room, took the respondent's view, and in part at least disagreed with International Representative, Seth Brown (Tr. 142, lines 12 through 25, 143 lines 1 through 20). It is not surprising, in the light of the conflict between the parties both with regard to the merits and with regard to Section 13 of the International Typographical Union laws, which Seth Brown said prohibited an apprentice from working on machines prior to the sixth year, with which interpretation respondent disagreed, that respondent should have adhered more closely to its proposal as to apprentices, than to any other one matter in dispute, other than wages. Of course it was something as to which both the Union and respondent had deep convictions, and was of tremendous importance to each. It is not surprising that even though it was clearly understood that full control over the number and work of apprentices meant an increase in the number of apprentices, and the freedom to train them on the machines prior to the sixth and last year of apprenticeship, that respondent should have insisted upon language which might very properly be construed by the Union as seeking something more

than respondent actually sought, and that the Union should have resisted a proposal which in its opinion was a serious departure from its desires and usual contract provisions as to apprentices. Here again, however, the Examiner erred in his statement that respondent's proposal was a demand with which the Union was unable to comply, even if it wished. The local could have signed the contract without the consent of the International, as was testified by Seth Brown. However, it was also testified that no counter-proposal was made by the Union which would have permitted either four or five apprentices in respondent's composing room, which would have been completely consistent with International Typographical Union laws (Tr. page 104, lines 1 to 10). Also, the evidence does not show that the Union made any counter-proposal to the respondent that apprentices be permitted to work on the machines for the fifth, or any other year.

In his comments about this proposal, the Examiner again, on page 14, lines 33 through 35, talks about the "reasonableness" of the respondent's proposal, failing to appreciate that the true test was not whether respondent's proposal was reasonable or unreasonable, but on the contrary, whether it was proposed by it in good faith as something which it wished to secure out of the negotiations or whether it was interposed in the negotiations as a sham or pretense, which is strongly denied. Can it be doubted, that in view of the history of the situation existing in respondent's plant, that this question of apprentices was something sincerely

and energetically advocated by it for what it believed to be the best interests of both the apprentices and respondent's composing room?

4. The respondent's position on the wage issue.

In studying the Examiner's findings with regard to the question of wages, it is extremely difficult not to come to the conclusion that what the Examiner really had in his mind comes to this, that if an employer has extra cash in his till, it should be passed out to the employees of the plant, notwithstanding all other factors. It seems inconceivable to the Examiner that an employer should believe that the present wage is all that he should pay. The Examiner seems to be impressed that when the Union changed its own demands three times in 1940, respondent made no counter-offer, and he overlooks entirely the reason that respondent made no counter-offer, which was that it was paying the prevailing scale in comparable competing newspapers. This was the reason why the Union kept coming down on its offer, and eventually agreed to continue the unsigned contract unchanged for another year, without any wage increase for the following year. Then again the Examiner makes special note that Respondent did not contend in 1941, that it could not afford the proposed wage increase. It is immaterial whether or not respondent could afford to pay a wage increase in 1941. If it could not pay it, and it was not paying the prevailing wage rate, then respondent should go out of business on the ground that it wasn't conduct-

ing an economically profitable business undertaking. The criterion was whether or not respondent was paying its employees a wage which was comparable for the same type of work to that prevailing in the same community by its competitors. If by the skill and experience of respondent's management, it was fortunate enough to have a small surplus out of which an increased wage could be paid, then it would not have to go out of business, but it still should not pay it unless it was not paying the comparable wage in the industry. Testimony showed definitely from the lips of Seth Brown that respondent was paying as high a wage as were its competitors. If it be argued that possibly certain of the competitors had not been organized by the Union, the answer is that until such time as the competitor was organized, or it agreed to raise its wage scale along with respondent, respondent should not be singled out and penalized so as not to be able fairly to compete with those engaged in similar business. This test was apparently given little or no consideration by the Examiner, whose views may be summed up in his statement in criticism of respondent "It (respondent) admitted that the increase would not have embarrassed it financially, but argued that granting the printers an increase would have required it to grant similar increases to the other unorganized employees." Here again his test is not whether respondent, in fairness should have granted increases to keep up its part of the standard of living in conjunction with others, but whether or not financially the increase could have been absorbed by respondent.

Carrying his idea to a logical conclusion would throw all wages out of line, because such increases, under his theory, should be granted except when to do so would financially embarrass the employer. Then too, one need not have to have an anti-Union bias, and the writer certainly has none, to believe that it is only fair and just to treat one's unorganized employees simliarly to those who are organized, and that if an increase is granted to one classification of employees, which raises that classification above another similar classification, then an equal increase should be given to the other classification, with which the Examiner seemed to be very clearly not in accord. Instead, the Examiner complains because the printers were not given their increase until respondent was able or willing to increase the wages of its remaining sixty (60) odd unorganized employees. One may be a firm believer in the purposes of the Wagner Act and in Unions, but still be of the opinion that any such view is unfair and unjust in affording one treatment for those who have combined to wield economic power through collective bargainlng, and another and much less favorable treatment to those whose cause may be equally meritorious, but who for one reason or another have not combined to wield an economic weapon in the same manner as the former group. When the Examiner states his disapproval of respondent's position because he says it would necessarily mean that an organized unit of an employer could not hope for a wage increase until the entire plant as a whole received one, regardless of the individual

merits of the needs of each particular craft or group, he saves himself by reason of the qualification referring to individual merits. In reality, if the various crafts and groups in a plant are each receiving the prevailing or going wage, for the type of work being performed, then a wage increase should be general in proportion to the value of the services each group performs, and it would not be fair to make an unwarranted increase in the scale of one group, without at the same time making a comparable increase for the others. It will be seen therefore, that from respondent's view, C. H. Hoiles is entirely correct in viewing the matter of wage increases squarely on the basis of what was the prevailing wage, and could any increase be also granted to others in the plant, rather than upon the test of the Examiner as to whether respondent could afford financially to grant an increase to the printers, who constitute only about twenty-five (25%) percent of the total number of employees in respondent's plant.

Another factor which the Examiner fails to take into consideration at all, is the undisputed testimony of C. H. Hoiles that national advertising was on the decline during the negotiations in 1941 (Tr. p. 414, lines 18 through 24), trend which was admitted by the Board's Attorney at the hearing (Tr. 414, line 24). Incidentally, since this is a matter of public record, the Court could take judicial notice that not only national, but local advertising has had a very serious decline for newspapers generally, and particularly country newspapers such

as respondent, since April, 1941, and that such decline continues very materially today, with a very unfortunate decrease in the revenues of these newspapers, of which advertising is their chief source of income. But this subject was not one in which the Examiner seemed to take any interest whatsoever.

The Examiner mentions in his report that in March, 1941, the Union negotiated a series of contracts with the commercial job printers in the Santa Ana vicinity, and also with three weekly newspapers similarly situated. These contracts raised the hourly wage rate for printers working in them, from which the Examiner draws the conclusion that respondent should also have raised its hourly wage rate similarly. What he fails to take into consideration, is that there is a broad distinction between the work of printers in a daily newspaper, and printers who work in either commercial plants or in weekly newspaper plants. In both the latter categories, there is not the steady, regular, uniform work that there is in the composing room of a daily newspaper. Particularly in commercial shops, the work is often more exacting, it is crowded into a shorter period of time, as a special job has to be gotten out, and printers in commercial job plants are often idle a considerable portion of time except when special jobs are in the shops (Tr. p. 432, lines 16 through 25, p. 433 lines 1 through 13). Consequently, the hourly operating costs in a commercial job plant, are bound to be higher than those on a daily newspaper. Although the Exami-

ner points to the increase in hourly wage rate in the commercial plants, and in the three weekly newspapers in the vicinity, he does not take into consideration that there was no increase in the daily wage rate in the daily newspapers with which respondent was competing, and the testimony of Seth Brown already referred to, was that respondent up to the time of the strike in April, 1941, was still paying as high a scale as its competitors (Tr. 120, lines 22 through 25; p. 121 lines 1 through 10).

Furthermore the testimony of Mr. C. H. Hoiles shows that the operating costs in the composing room of the respondent in the years 1939 and 1940 were actually higher than the comparative operating costs in the boom year of 1929 (Tr. p. 440, lines 7 through 25; p. 441 lines one through 12).

Respondent believes very sincerely that in April of 1941, and it is even more true today, in view of the national emergency, and the fight our country is making for its very existence, that the average American worker would prefer to work longer hours at the same hourly rate, even up to 48 hours per week or more, rather than to have his weekly hours reduced or maintained at less than 40 hours per week. Inasmuch as respondent was paying the prevailing wage scale of daily newspapers in the community, and had been for some time prior thereto, and was continuing to do so in spite of steadily decreasing revenues, respondent believes that it will be difficult for the average fair-minded person to agree with the Examiner that it has been

guilty of an unfair labor practice, simply because it has refused to step out of line and pay a higher hourly wage than prevailed in the field and with its competitors. On the contrary, in agreeing in April, 1941, to increase the working hours from 37½ to 40 per week, which was something as to which the Union had no option under the existing written but unsigned agreement, respondent was unmistakably offering the opportunity to the printers in its composing room, to earn two dollars and fifty ($2.50) cents per week more.

5. Refusal to bargain during the strike.

Many of the Exceptions, and much of the comment which respondent would ordinarily make in this connection, has already been set forth under "C" of the Examiner's report. However, respondent does strongly except to the finding of the Examiner that "the crucial issue of reinstating the strikers, was arbitrarily excluded from the matters to be discussed." Respondent did not arbitrarily or otherwise refuse to discuss the issue of reinstatement. What it did state was that by reason of the failure of the Union on May 2nd or 3rd just after the beginning of the strike, to consider the return of the strikers to work at that time, as invited so to do by respondent and communicated to George Duke, President of the local Union, before substantial replacements had been made by respondent, that the Union itself had placed its members who had been regular employees of respondent, in an unfortunate situation, which respondent re-

gretted, but for which the Union, and not respondent was responsible. Furthermore, even though respondent was ready and willing at all times to discuss matters of mutual interest with the Union and its representatives, nevertheless in addition to the refusal of George Duke on behalf of the Union, to permit striking employees to return on May 2nd or 3rd, 1941, the Union, except for its letter of approximately July 25, 1941, made no other effort either to resume collective bargaining negotiations with respondent, or to seek reinstatement of those who were out on strike. The interests of the employees themselves, that of the Union, and that of the respondent, each required that the Union, which had taken the strike vote and pulled the printers out of the shop, make every effort to ascertain whether or not it would have been possible for the strikers to return to their work pending further negotiations with respondent. Consequently, the Examiner is again in error when he states that there was any refusal on the part of the respondent to bargain during the strike, and the mere statement in the letter of August 2nd, by respondent to the Union, that respondent's position had not changed as to wages and apprentices, was not a refusal to bargain, but merely a re-statement of the position which it had taken throughout, with regard to these two subjects in the April, 1941 negotiations.

6. Conclusions as to the bargaining negotiations.

In excepting to the findings of the Examiner under this heading, respondent again refers to the

testimony, comments and arguments submitted by it with regard to the points of difference between the Union and itself. If the Examiner is, as he states, convinced "that the respondent on April 26, 1941, and at all times thereafter, refused to bargain collectively with the Union, as exclusive representative of the employees in an appropriate unit", he has, as has already been stated, arrived at such a conclusion and finding by failing to take into consideration, matters which were essential, and without which his conclusion and finding could not be other than one-sided, and based upon only a small portion of the evidence submitted at the trial. Not only has the Board failed to uphold the burden of proof falling upon it to establish the unfair labor practices charged in the complaint by a fair preponderance of the evidence, but it was necessary for the Examiner, in order to reach his conclusion and finding, to resort to inference, whether "well nigh inescapable or otherwise", innuendos and caprice, in his effort to find a basis for the conclusion which he very obviously sought to attain, regardless of the substantial evidence in the case. Just as the Examiner was either unwilling or unable to appreciate that in advocating a greater number of apprentices, and their earlier training on the machines, respondent was not only fighting for its own best interests, but also that of the apprentices themselves or those who might have become apprentices, were they not excluded by the Union's practice of limiting apprentices, and also for those who would have been able to learn much faster than the Union was willing

to permit, thus in effect shutting the door of opportunity in the face of young men who are desirous of becoming apprentices and learning the trade and improving their lot, thus striking a blow at the American system of free enterprise on the part of the individual worker, so the Examiner was also unable to see any viewpoint except that which the Union desired the Examiner to behold.

For these and many other reasons, some of which have already been given, and others have not even been mentioned by reason of the desire not to unduly prolong these Exceptions, respondent strongly excepts to the general conclusion and finding of the Examiner, either that the respondent refused to bargain collectively with the Union at any time, or that it interfered with, restrained or coerced its employees in the exercise of rights guaranteed to them, or that the strike of April 30, 1941, was either caused or prolonged by respondent in any manner, or particularly by what has been charged to be a refusal on its part to bargain in good faith.

7. Refusal to reinstate the workers.

Respondent excepts to the Examiner's findings and conclusions, not only as to the cause of the strike, but that the strikers were entitled to reinstatement thereafter on their own application, whether their places had already been filled by employees hired by the respondent following the strike, or not. In this connection, respondent points out that at no time was there ever an application made by the strikers for reinstatement, that the only communication from

the Union in that connection in asking for a meeting, was met by a response from the respondent that it would sit down and meet with the Union. The letter of the Union which was erroneously stated by it to be a request for reinstatement, and which position was also erroneously upheld by the Examiner, did not indicate under what terms or conditions the employees desired to return, if they did, and how many of them might be expected to return in the event respondent had a place for them. Respondent was never informed in the intervening months which had elapsed since the strike, as to what the Union or the strikers had in mind, or whether they were willing to return under the conditions existing at the time they walked out on strike. How, therefore, can it be truthfully said that the letter of respondent was in any wise a refusal to reinstate?

Respondent emphatically excepts to the Examiner's finding and conclusion that it discriminated in regard to the hire and fire of its said employees, or that it refused to reinstate those who had gone out on strike, or that it thereby discouraged membership in the Union, or that it interfered with, restrained or coerced its employees in the exercise of rights guaranteed to them in Section 7 of the Act. On the contrary, respondent believes and contends that it was not caused by any unfair labor practice on its part, and maintains that the record does not show substantial evidence of any unfair labor practice on its part. In the absence of any unfair labor practice by respondent, causing the said strike, even if there had been an unqualified request for the re-

instatement of the strikers, and a refusal on the part of respondent as employer to reinstate, neither of which was shown by the evidence to have occurred, there was no obligation on the part of respondent to reinstate the strikers. Export Steamship Corporation, 12 N. L. R. B. 309 (1939), in which case the complaint was dismissed, even though the company offered only to take back the strikers as it saw fit, and when it had vacancies in its plant. Milne Chair Company, 18 N. L. R. B. 53, 56, 58 (1939) where the Union proposed an increased wage scale, and the company made a counter-proposal of a decrease in wages, resulting in a strike. Decatur Newspaper, Inc., 16 N. L. R. B. 489, 495 through 499 (1939), where a strike also occurred as negotiations had broken down. In the case of Colmer Steamship Co., 18 N. L. R. B. 1, page 20 (1939), the Board held that where the strike was not brought about by an unfair labor practice on the part of respondent, it might hire new employees to take the place of the strikers, and need not discharge the new employees to make room for the strikers.

Respondent maintains that the facts of the case at bar are covered by the rulings in the foregoing cases, and that if the Board or the Courts were to hold otherwise, the determination in reality would constitute a ruling that an employer can only refuse at its peril, to accede to the demands of a Union, however unreasonable and at the risk of a prolonged strike and the enforced reinstatement of the striking employees with back pay.

8. The effort to induce Bray to abandon the strike.

Respondent excepts to the Examiner's ruling that efforts made to induce William Bray to return to the employ of respondent after the strike had been called, were unfair labor practices, or that they in any wise caused the strike which had already occurred, or in any wise constituted an unfair labor practice in connection therewith, or that such efforts either interfered with, restrained or coerced respondent's employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce.

Respondent denies and excepts to the finding of the Examiner, for the reasons set forth under

1. Relating to the business of the respondent.

V. The remedy.

Since Respondent has excepted to and disagreed with practically all of the ultimate findings of the Examiner, except with regard to editorial comment by R. C. Hoiles, it of course believes that the remedies suggested by the Examiner are not only unnecessary but exceedingly unfair and unjust. A gross miscarriage of justice would result if respondent were required to reinstate with back pay, employees who went out on strike because the management could not in good faith comply with their demands, who never indicated on what terms they were willing to come back, or that they were willing to come back at all, until months after it had been necessary to employ others, and have contrib-

uted nothing to the business of respondent in the interim, in contra-distinction to those who had been doing the work in respondent's composing room since it became necessary to make replacement.

## CONCLUSIONS OF LAW.

Respondent excepts to each of the conclusions of law except 1, part of 2, and 8. With regard to part of 2, respondent admits and agrees that all the employees in the composing room of respondent's Santa Ana plant, did constitute at all times prior to the strike and perhaps for a day or two thereafter, an appropriate unit for the purpose of collective bargaining, but denies that after the conversation of C. H. Hoiles with George Duke, President of the Union, on May 2 or 3, 1941, in which respondent offered to take back the employees as needed, which offer was refused by the Union, that thereafter they did constitute the bargaining unit in respondent's plant.

## RECOMMENDATIONS.

Respondent excepts to each and every recommendation offered by Trial Examiner.

## CONCLUSION.

Respondent respectfully submits that upon the pleadings and the evidence brought forth at the trial, complaint against respondent should be dis-

missed with prejudice, and judgment rendered accordingly for respondent.

Respectfully submitted,
WILLIS SARGENT,
Attorney for Respondent.

Dated: this 30th day of July, 1942.

N.L.R.B. Docketed Aug. 1, 1942.

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United States of America
Before the National Labor Relations Board
Case No. C-2225

In the Matter of REGISTER PUBLISHING CO., LTD.,

and

SANTA ANA INTERNATIONAL TYPOGRAPHICAL UNION No. 579.

Mr. Charles M. Ryan, for the Board.

Mr. Willis Sargent and Mr. Paul Hart, of Los Angeles, Calif., for the respondent.

Mr. Seth R. Brown, of Los Angeles, Calif., for the Union.

Mr. Bliss Daffan, of counsel to the Board.

## DECISION AND ORDER

### Statement of the Case

Upon charges and amended charges duly filed by Santa Ana International Typographical Union No. 579, affiliated with the International Typographical

Union, herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Twenty-first Region (Los Angeles, California) issued its complaint dated April 23, 1942, against Register Publishing Co., Ltd., Santa Ana, California, herein called the Respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, together with notice of hearing thereon, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged, in substance, that the respondent (1) on or about March 1, 1940, and at all times thereafter, refused to bargain collectively with the Union which represented a majority of the respondent's employees within an appropriate unit; (2) since July 29, 1941, has refused to reinstate 20 named employees who had gone out on strike on May 1, 1941; and (3) by these acts and by criticizing and condemning unions as rackets and union members as racketeers; by criticizing and condemning the principles of collective bargaining; by questioning employees concerning the Union; by statements that unions have never benefited anyone and employees are better off without a union; by statements that it would never enter into a written signed contract with the Union; and by promises of reward to employees if they would withdraw from

membership in and activity on behalf of the Union; has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On May 6, 1942, the respondent filed its answer, in which it denied the jurisdiction of the Board and denied that it had engaged in the unfair labor practices alleged in the complaint.

Pursuant to notice, a hearing was held in Santa Ana, California, on May 7, 8, and 11, 1942, before Will Maslow, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by a representative. All participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the close of the Board's case, and again at the close of the hearing, the respondent moved to dismiss the complaint for want of jurisdiction and also because of the insufficiency of the proof. These motions were denied by the Trial Examiner. At the close of the hearing, motions by both the attorney for the Board and the respondent to conform the pleadings to the proof were granted by the Trial Examiner without objection. During the course of the hearing, the Trial Examiner made rulings on numerous other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed. At the close of the hear-

ing, both the attorney for the Board and the respondent argued orally before the Trial Examiner. The respondent also submitted a brief to the Trial Examiner.

On June 11, 1942, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon all parties, in which he found that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act. He recommended that the respondent be ordered to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act, including the reinstatement with back pay of certain employees. Thereafter, on August 1, 1942, the respondent filed exceptions to the Intermediate Report. None of the parties requested leave to argue orally before the Board.

The Board has considered the exceptions filed by the respondent and, except as they are consistent with the findings of fact, conclusions of law, and order set forth below, finds them to be without merit.

Upon the entire record in the case, the Board makes the following:

## FINDINGS OF FACT

### I. The business of the respondent

Register Publishing Co., Ltd., a California corporation, is engaged in the publication of a daily newspaper in Santa Ana, California, known as the

Santa Ana Register, herein called the Register. During 1940 all the newsprint used by the respondent, amounting to 1,431,000 pounds, and valued at $34,636, was shipped to Santa Ana from Canada. During the same period miscellaneous materials and equipment valued at about $7,000 were likewise shipped from points outside the State of California to the respondent's plant in Santa Ana.

The respondent subscribes to the news services of the Associated Press, the United Press, and the International News Service; the greater part of the news of these services is gathered outside the State of California by these services and transmitted to the Register. This news constitutes about 12 percent of the total news appearing in the Register. In addition, the Register publishes a msicellany of special features, about 90 percent of which is furnished to it by feature services located outside the State of California. These features constitute about 8 percent of the total reading material of the Register.

About 6 per cent of the total revenue of the respondent is derived from national advertisers located outside the State of California. This advertising is transmitted to the Register by agencies likewise located outside the State of California. The respondent's total annual gross revenue is more than $300,000, two-thirds of which comes from its advertising and the remainder from its subscribers.

There has been no substantial change since 1940 in the operations of the respondent described above, except for a decline in national advertising.

The respondent employs from 80 to 85 persons, about 25 of whom were employed in April 1941, as printers or apprentices.

## II. The organization involved

Santa Ana International Typographical Union No. 579, affiliated with the International Typographical Union which was formerly affiliated with the American Federation of Labor but is now unaffiliated, is a labor organization admitting to membership employees in the composing room of the respondent's plant.

## III. The unfair labor practices

### A. Background

The Register has been published in Santa Ana since at least 1909. From 1909 to about 1928 it was owned by one Baumgartner. In 1928 it was acquired by the respondent, the then chief stockholder being J. F. Burke. In 1935 the Hoiles family, the present stockholders and publishers, purchased the stock of the respondent and have held it ever since.

From 1909 to 1935 the working conditions of the printers in the composing room were governed by an oral contract between the Union and the various owners of the Register. From 1935 to 1937 while the Hoiles family was in control, the terms of the prior oral contract were observed by the Hoiles although the oral contract was not formally renewed.

In 1937 the Union met with the respondent, the publishers of a competing newspaper in the county, known as the Santa Ana Journal, and the owners

of the commercial job printing shops in Santa Ana, and concluded a new agreement. The commercial job printers signed the agreement, but the respondent and the publishers of the Santa Ana Journal refused to do so. The terms of the oral agreement with the respondent were, however, reduced to writing. By its terms this agreement was to remain in force until March 1939 and provisions were contained therein providing for a closed shop and for a wage increase from 87½ cents an hour to 92 cents an hour at the beginning of the period covered by said agreement, and an additional increase to $1 an hour before the expiration date thereof; limiting the number of apprentices to three and specifying the type of work which they could do; and providing for a workweek of 5 days of 7½ hours, and for the payment of time and a half for all work in excess of 7½ hours on a given day with an option given the respondent to change the workweek to five 8-hour days by giving 2 weeks' notice to the Union. Likewise, this agreement provided that the constitution and bylaws of the Union were made a part thereof.

In March 1939, upon the expiration of the agreement, the Union met with the respondent in an attempt to negotiate a new agreement. While the record is not entirely clear regarding these negotiations, apparently the 1937 agreement was continued in existence by mutual agreement for a period of 1 year, after an effort on the part of the Union to obtain new terms proved unsuccessful.[1]

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(1) Seth R. Brown, a representative of the In-

B. The refusal to bargain with the Union

1. The appropriate unit

The complaint alleges, and the respondent's answer admits, that all the employees in the composing room of the respondent's Santa Ana plant constitute a unit appropriate for the purposes of collective bargaining. We find that all the employees in the composing room of the respondent's Santa Ana plant have, at all times material herein, and do now, constitute a unit appropriate for the purposes of collective bargaining, and that said unit insures to employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

2. Representation of a majority in the appropriate unit

The complaint alleges that prior to March 1, 1940, and at all times thereafter, a majority of the em-

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ternational Typographical Union, testified with respect to the negotiations in 1939, that "I guess they didn't come to an agreement on the terms and finally it was allowed to continue" until March of 1940. George Duke, vice president of the Union, testified that in March 1939, "there was a brief negotiation during which time no change in the contract was made, although requested. I believe at that time, although I was not present, I believe a request was made that a contract be signed and continue for another year." Duke was then asked if he knew whether or not the agreement was continued in existence from March 1939 to March 1940 and replied, "Yes, because I was present at the union meeting at which we agreed to continue for another year by action of the membership."

ployees in the respondent's composing room designated the Union as their representative for the purposes of collective bargaining with the respondent and therefore the Union has been since March 1, 1940, and is now, the exclusive representative of all said employees for the purposes of collective bargaining. The respondent's answer admits that up to April 30, 1941, the Union was such exclusive representative.

On the night of April 30, 1941, the employees in the respondent's composing room went on strike, and the strike has continued ever since. As found below, this strike was occasioned by the respondent's unfair labor practices in refusing to bargain with the Union. The employees who were in the respondent's employ and whose work ceased as a result of the respondent's unfair labor practices, therfore, remained employees within the meaning of Section 2 (3) of the Act.

We find that on March 1, 1940, and at all times thereafter, the Union was and that it now is the duly designated representative of a majority of the employees in the appropriate unit, and that, pursuant to Section 9 (a) of the Act the Union was and is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

### 3. The negotiations in 1940

In March 1940 the Union submitted its proposals for a new contract, requesting a wage rate of $1.15 an hour and 1 week's vacation with pay

for all printers. As shown above, the existing contract provided for $1 an hour and contained no provision for vacations. Early in March 1940 C. H. Hoiles, the secretary-treasurer of the respondent and son of R. C. Hoiles, its president, met with representatives of the Union and rejected the proposals, stating that since the respondent paid overtime to its printers, it was opposed as a matter of principle to granting vacations with pay. Hoiles also stated that the respondent would not increase the hourly rate of pay of the printers. The Union then requested the respondent to submit counter-proposals. Sometime later in March, the respondent proposed that there be no discrimination between union and non-union members in the plant;[2] that it be given "full control" over apprentices, thereby eliminating all restrictions such as those contained in the previous agreements relating to the number of apprentices it could hire and the type of work which they could perform; that the rate of pay of "straight matter operators"[3] be decreased from the hourly rate of $1, provided in the

(2) C. H. Hoiles testified that the respondent meant by this proposal that it desired that the previously established closed shop be abolished.

(3) A "straight matter operator," as the name implies, is a printer qualified only to set up on a typesetting machine straight editorial matter, as distinguished from the more difficult printing, such as setting up advertising matter and market quotations, which are customarily handled by "combinations operators" who are capable of doing any sort of work in a composing room. Duke testified that there were three combination operators in the respondent's employ.

1939 agreement, to 75 cents; and that the workweek be increased to 40 hours. Each of the points set forth in the respondent's proposal meant a detraction from existing conditions of the employees affected—then numbering 22 operators and 3 apprentices.

Upon receipt of the respondent's proposals, the Union requested the assistance of Brown, a former vice president of the International Typographical Union, herein called the ITU, who thereupon came to Santa Ana to conduct negotiations with the respondent relative to a collective bargaining agreement. Brown met with C. H. Hoiles on March 20, 1940, to discuss the respondent's counterproposals. Hoiles stated that the respondent wished to have full control of the work done by the apprentices during their 6-year apprenticeship and specifically that apprentices should be allowed to work on the linotype machines prior to the last year of their 6-year apprenticeships. In reply Brown quoted from the bylaws of the ITU which he contended forbade the inclusion of such provisions in the contract of a subordinate local. Brown likewise opposed the respondent's proposal that the wages of straight-matter operators be set at 75 cents an hour, contending that this was below the minimum rate of $1 an hour established for all operators under the prior agreement. The parties also discussed, in detail, the Union's proposal regarding vacations with pay. No agreement was reached on any terms at this meeting. On March 27, 1940, Brown and Hoiles met again and continued their discussions.

On April 15, 1940, Brown and Duke, vice president of the Union, met with Hoiles. Brown offered to submit to the Union for ratification a provision that the hourly rate of the operators be increased to $1.06 an hour, a drop from the original demand of $1.15 an hour. Hoiles rejected this offer. Hoiles also reiterated his position expressed at the prior conferences that complete control of the apprentices be vested in the respondent, and Brown repeated his previous assertion that such a provision was contrary to the laws of the ITU. Brown then suggested that the matters in dispute between the Union and the respondent be arbitrated.[4] This proposal was also rejected by Hoiles. Duke then stated that if an agreement was reached, the Union desired it to be reduced to writing and signed by the parties. Hoiles replied that the respondent would not consider signing a contract, that his word was good, and that the Union did not need to fear that he would violate an oral agreement. The meeting then ended with a request by Brown that the respondent submit new counterproposals.

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(4) There is some conflict between the testimony of Brown and Hoiles on this point. Brown testified that he requested that "all" matters in dispute between the parties be arbitrated, whereas Hoiles testified that the Union's willingness to arbitrate was restricted to the wage issue. The bylaws of the ITU forbid arbitration of its "general laws" which include provisions relating to apprentices. Under these circumstances, we find that Brown's proposal of arbitration was restricted to those matters which could be arbitrated under the laws of the ITU and that this was the respondent's understanding regarding the proposal.

On May 3, Brown, Duke and C. H. Hoiles met again. The representatives of the Union asked Hoiles if the respondent had any counterproposals to submit and were advised that it did not. Duke then presented a new proposal on behalf of the Union providing for a graduated wage scale and graduated provisions for vacations with pay, as follows:

$1.03 an hour to September 1, 1940
1.04 an hour from September 1, 1940 to March 1, 1941
1.05 an hour from March 1, 1941 to September 1, 1941
1.06 an hour from September 1, 1941 to March 1, 1942
1.08 an hour from March 1, 1942 to March 1, 1943.

2 days vacation with pay in 1940
3 days vacation with pay in 1941
5 days vacation with pay in 1942
5 days vacation with pay in 1943.

The Union again requested that any agreement reached between the parties be reduced to writing and signed and Hoiles reiterated his previous assertions that the respondent would not sign a contract with the Union. However, Hoiles agreed to take the Union's modified demands upon advisement. This was the second time the Union had lowered its original demands.

On May 16, 1940, the parties met again and C. H. Hoiles rejected the Union's modified proposal, stating that he could not grant a wage increase, no

matter how small, because his other employees would then ask for a similar increase. The Union again requested the respondent to submit counter-proposals but Hoiles stated that it had none.

The Union met that evening and decided to hold in abeyance the entire negotiations with the respondent. No further conferences with the respondent were held until April 1, 1941. However, the terms of the oral agreement, which expired in March 1940, were observed by the respondent until May 1, 1941.

4. The negotiations in 1941

In March 1941, the Union negotiated a series of contracts with commercial job printers in Santa Ana and with three weekly newspapers in the vicinity. These contracts raised the hourly wage rate of the printers involved from $1 an hour to $1.07 an hour up to October 1, 1941, and to $1.12 an hour from October 1, 1941 to October 1, 1942. On April 3, 1941, the Union addressed a letter to the respondent advising it of the aforesaid contract with the printing establishments in the vicinity, and requesting a conference for the purpose of negotiating a collective bargaining agreement for 1941. Pursuant thereto, a meeting was held early in April between representatives of the Union and C. H. Hoiles. Brown notified Hoiles of the contract between the Union and the job printers and weekly newspapers, contended that the wage rate established thereby were the prevailing wage rates in the community, and requested Hoiles to meet the rate. Hoiles stated that while the respondent was financially able to grant the increase requested, it would

not do so because that would necessitate increasing the wages of employees in other departments. Hoiles countered with a proposal that the work-week be increased from 37½ to 40 hours, thus eliminating overtime pay for the extra 2½ hours a week in the event that the printers worked as much as 40 hours during a given week. Brown rejected this proposal but agreed to submit it directly to the union membership. The Union again requested that any agreement reached between the parties be signed and Hoiles maintained the position which he had taken throughout the negotiations that the respondent would not sign a contract with the Union. The apprenticeship question was also discussed at length and both parties took the same position on this issue which they had assumed during the 1940 negotiations.[5]

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(5) In its exceptions the respondent contends that the term "full control of apprentices," when interpreted in the light of the evidence in the record, actually meant and was understood by the parties to mean that the respondent merely desired to employ five apprentices, which the ITU constitution would have permitted, instead of three, as provided in the agreement in effect prior to 1940, and that such apprentices be permitted to receive training on typesetting machines prior to the 6th year of their apprenticeship. While it is true that Brown, when asked what position the respondent had taken on the apprentice issue during the conferences in April 1941, testified that Hoiles stated that he "believed that an apprentice should be allowed to work on a machine before his sixth year," there is no evidence in the record that the respondent departed from the position relative to apprentices which it first took at the beginning of negotiations in 1940. Duke and Brown testified that the

On April 18, 1941, the parties met again and the Union notified C. H. Hoiles that its members had rejected the proposed increase of the workweek to 40 hours at straight-time pay. After some discussion on the wage issue the Union requested the respondent to make a new offer but Hoiles declined to do so. Brown then asked Hoiles to fix a date for a further conference. Hoiles replied that the parties could meet again but that it would be useless; that they could talk about the war or the weather, but there would not be an increase in wages. A meeting was nevertheless scheduled for April 26. On that day, as he waited for C. H. Hoiles at the respondent's office, Brown was notified that the meeting would not take place, but that the Union would receive a written statement with regard to the respondent's position.

On April 29, 1941, the Union received a letter from the respondent, dated April 26, which read:

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respondent's proposal at that time was for "full control over apprentices both as to the number and as to the work they were doing during their apprenticeship." Likewise, on cross-examination, Hoiles was asked if it were not a fact that the respondent "at all times" insisted that it be given complete control over apprentices "as to the number and the work to be done," and replied in the affirmative. As will be noted, this is the same position reflected by the respondent's letter of April 26, 1941, hereinafter set forth, wherein it is stated, "Also, we are to have complete control of the number and work of our apprentices, as we see fit for efficient operation of our plant." Under these circumstances we find, as did the Trial Examiner, that throughout the negotiations the respondent insisted on "full control" of apprentices, as the term implies.

In accordance with our recent negotiations, the Board of Directors of the Register Publishing Co., Ltd., have authorized me to place this proposition before you in writing.

Namely, we are willing to allow our printers to work forty (40) hours a week, instead of 37½, at the same rate they are now getting $1 an hour. This will give them a weekly increase of $2.50, or approximately $130 a year.

Also, we are to have complete control of the number and work of our apprentices, as we see fit for efficient operation of our plant.

Hoping this meets with your approval, we are,

Very truly yours,
REGISTER PUBLISHING CO., LTD.
(s) C. H. HOILES
Secretary-Treasurer

Following receipt of the respondent's letter Brown met with Hoiles on the afternoon of April 30, 1941, and urged him to confer further with the Union in an effort to settle the controversy. Hoiles stated that the respondent's final position on the matter was expressed by the letter of April 26. Brown advised Hoiles that the Union could not accept the respondent's proposals.

On the evening of April 30, 1941, the Union met and Brown reported on the negotiations with the respondent. A general discussion then ensued with respect to the respondent's refusal to sign an

agreement with the Union, its insistence on abolishing the closed shop, and the position which it had maintained throughout the negotiations relative to the matter of apprentices and a wage increase.[6] As a result of this discussion, a strike vote was taken and the Union voted to go out on strike.

5. The strike and the events subsequent thereto

The strike began on the evening of April 30, 1941. All the employees in the composing room went out on strike that evening or the next morn-

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(6) The respondent contends that the evidence establishes that the only points in issue between it and the Union when the strike was called were the matters of apprentices and a wage increase. In support of this, the respondent points to the fact that these are the only two matters adverted to in its letter of April 26, 1941. On this point, the evidence discloses, as found above, that at the conference early in April 1941, the Union repeated its previous request that any agreement reached between the parties be signed, and Hoiles stated that the respondent would not sign an agreement. There is no evidence that the respondent at any time thereafter receded from this position. Likewise, there is no evidence that the respondent ever receded from its position taken at the beginning of negotiations relative to the closed shop. On the other hand, the evidence is undisputed that the Union considered that both the matters of a signed agreement and a closed shop were in issue, as well as apprentices and a wage increase, since at the meeting when the strike vote was taken these matters were discussed as points of difference between the Union and the respondent. Under these circumstances we find, as did the Trial Examiner, that throughout the negotiations the respondent did not recede from its position that it would not agree to a closed-shop provision or sign a contract with the Union.

ing with the exception of the foreman and one apprentice.[7]

On April 30, 1941, the night the strike began, C. H. Hoiles called union-member William Bray into his office, and requested him to return to work the next day, promising him $1.50 an hour for overtime work in addition to his regular wages. Bray replied that the respondent might conclude to execute a contract with the Union within a day or so, in which event he would have incurred the displeasure of the Union by returning to work. According to Bray's testimony, Hoiles replied, "We will not sign up in two or three days and we will never sign with the Union." When Bray explained that he would be fined $1000 by the Union if he returned to work during the strike, Hoiles offered to take care of any fine imposed by the Union. Bray stated that he "would have to go home and talk it over with my wife." Although Hoiles denied, in part, this conversation, we credit the testimony of Bray, as did the Trial Examiner.

On May 1, 1941, R. C. Hoiles,[8] the respondent's president, visited Bray's home and spoke to the latter's wife. Hoiles requested Mrs. Bray to use

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(7) The foreman was W. A. Lawrence. His name was erroneously included in the complaint as one of the employees refused employment by the respondent because of participation in the strike but was stricken therefrom during the hearing on motion of counsel for the Board.

(8) Although R. C. Hoiles was present during the hearing he did not testify.

her influence to induce her husband to return to work. When Mrs. Bray referred to the possibility of a $1000 fine if her husband did so, Hoiles offered to post $1000 in a bank in escrow to provide for that contingency, and, in addition, offered to furnish all the money which she needed for her immediate use. Mrs. Bray refused. During the conversation Hoiles stated that he did not believe in unions and that his self-respect prevented him from taking back the union men.

On May 2 or 3, Duke met C. H. Hoiles and advised him that the Union was still willing to negotiate with the respondent. Hoiles replied that any of the strikers who desired to return to work would be considered individually.

On May 4, 1841, R. C. Hoiles visited Bray at his home and offered him $40 a week if he would return to work. Bray refused. During the conversation, R. C. Hoiles stated that difficulties with the ITU on a prior occasion had cost him $8000 and that he would never have anything to do with it.

On May 5, 1941, Clarence Liles, business agent for the Allied Printing Trades, called on C. H. Hoiles and advised him that the stereotypers employed by the respondent would not pass through the picket line established by the Union.[9] Liles told Hoiles that if the picket line were removed or the printers came back to work, the stereotypers would

(9) The stereotypers have not yet returned to work and their places have been filled by new employees.

return to work. Hoiles replied that, so far as the members of the Union were concerned, they would never come back.[10] On May 5, one striking printer returned to work[11] and by May 6, 1941, all the remaining employees who were on strike were replaced by new employees.

During May 1941, a conciliator of the United States Department of Labor conferred separately with the Union and the respondent and urged both to submit the dispute to arbitration. The Union agreed to do so but the respondent refused.

On July 25, 1941, the Union held a meeting and, as a result thereof, addressed the following letter to the respondent:

> At a meeting of Santa Ana Typographical Union #579, held on Friday, July 25, the following action was taken by unanimous vote:
>
> The Union requests a meeting with the Santa Register Publishing Company for the purpose of renewing negotiations and reaching an

(10) This finding is predicated upon the testimony of Liles and Edward Saleh, a stereotyper present at the conferences. C. H. Hoiles testified, however, that the statement which he made was, "What if they never come back?" We credit, as did the Trial Examiner, the Liles-Saleh version of the statement.

(11) The printer who returned to work was C. C. Thrasher. His name was erroneously included in the complaint but was stricken therefrom during the hearing on motion of counsel for the Board.

agreement for the reinstatement of the former union employees of The Santa Daily Register.

Yours truly,

SANTA ANA TYPO-
GRAPHICAL UNION
# 579
(s) J. W. JONES
President
(s) O. E. FISHER
Secretary

On August 2, 1941, the respondent replied as follows:

We acknowledge receipt of your letter of recent date which advises us of the action of your Union as of July 25th last.

The Santa Ana Register has never refused to negotiate with you and will not refuse to negotiate with you now. Before sitting down with you, however, we should point out that since your members went out on strike on May 1st last, nearly three months ago, it has been necessary for us to employ others to take the places of those who went out on strike.

These new employees have now become a part of the establishment and we do not feel, in fairness to them, that we can replace them now. Furthermore, shortly after your members went out on strike, we offered, through your Mr. Duke then local President, to take back any of your members who were out on strike, whom we believe could be utilized if they re-

turned to The Register because of vacancies we had at that time. These men did not return, however, and it was necessary to fill the vacancies by employing others who are now a part of our staff.

On behalf of the Management I also feel it necessary to indicate to you that there has been no change in our situation since the Union and the Management found it impossible to get together on the questions of increased wages and apprentices.

If you wish to sit down with us, in view of what I have written, the Management will certainly not refuse to confer with you. We think it only fair, however, that before doing so you should be given our attitude, as outlined above.

Sincerely,

REGISTER PUBLISHING CO., LTD.

By (s) C. H. HOILES

There were no further conferences or communications between the Union and the respondent after the above letter. The strike was still in progress at the time of the hearing and none of the 18 striking employees listed in Appendix A, attached hereto, had returned to work.

6. Concluding Findings

The complaint alleges that the respondent refused to bargain in good faith with the Union on March 1, 1940, and at all times thereafter, and that the strike which began on April 30, 1941, was

caused by these unfair labor practices on the part of the respondent. The respondent contends that it has bargained in good faith with the Union in an effort to reach an agreement but that an impasse was reached on or about April 30, 1941, because of the failure of the parties to agree regarding the particular terms of such an agreement and that the strike was called by the Union as a result thereof.

It is clear, however, from the facts recited above, that the respondent has failed and refused to bargain collectively with the Union throughout the period of negotiations. The refusal of the respondent to reduce any agreement which might be reached to a written signed agreement constituted a refusal to bargain.[12] Moreover, the duty imposed by the Act "encompasses an obligation to enter into discussion with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented . . ."[13] Although

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(12) Matter of H. J. Heinz Co. and Canning and Pickle Workers, Local Union, etc., 10 N.L.R.B. 963 aff'd 311 U. S. 514.

(13) Matter of Singer Manufacturing Co. and United Electrical, Radio & Machine Workers of America, Local No. 917, affiliated with the Congress of Industrial Organizations, 24 N.L.R.B. 444, 464, enf'd as mod. Singer Mfg. Co. v. National Labor Relations Board, 119 F. (2d) 171 (C.C.A. 7), cert. den. 313 U. S. 595; Globe Cotton Mills v. National Labor Relations Board, 103 F. (2d) 91, (C. C.A. 5) enf'g as mod. Matter of Globe Cotton Mills and Textile Workers Organizing Committee, 6 N.L. R.B. 461; National Labor Relations Board v. Gris-

the Act does not require that an employer agree to any particular terms and failure to conclude an agreement may not alone establish a refusal to bargain, nevertheless, such matters may be relevant, in conjunction with the entire course of conduct, in evaluating the intent of the parties. In view of the past relationship between the parties, including the closed shop, apprentice control, and the payment of prevailing rates, the respondent's insistence, without any justification shown, that the Union surrender benefits it had gained, is the very antithesis of any desire to reach a mutually acceptable agreement. The respondent's refusal to arbitrate the matters in dispute, establishes that it was not concerned with the merits of the substantive issues but was determined rather to deny to the Union the benefits of a collective agreement. That this was its motive is established by the respondent's anticipatory refusal to reduce to writing and make contractually binding any agreement which might be reached. Further proof is found in the admission, during the strike, of *H. C.* Hoiles that the respondent would "never sign with the Union" and of R. C. Hoiles that he "did not believe in unions" and "would never have anything to do with (the ITU)." Finally, the respondent's refusal to bar-

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wold Mfg. Co., 106 F. (2d) 713 (C.C.A. 3) enf'g Matter of Griswold Mfg. Co. and Amalgamated Association of Iron, Steel and Tin Workers etc., 6 N.L.R.B. 298; National Labor Relations Board v. Westinghouse Air Brake Company, 120 F. (2d) 1004 (C.C.A. 3) enf'g as mod. Matter of Westinghouse Air Brake Company and United Electrical, Radio and Machine Workers etc., 25 N.L.R.B. 1312.

gain during the strike by requiring that reinstatement of the strikers be considered on an "individual" basis and by removing the basis for negotiations by permanently replacing the union members, conclusively establishes the respondent's determination to evade its statutory obligation.

We find that on March 1, 1940, and at all times thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit in respect to rates of pay, wages, hours of work, and other conditions of employment, and that by such refusal, and by the statements made to Bray and his wife by C. H. and R. C. Hoiles and the inducements offered by the respondent to persuade Bray to cease his concerted activity and abandon the Union, the respondent thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. We further find that the strike which began on April 30, 1941, was the result of the respondent's refusal to bargain with the Union and that it was prolonged thereafter because of the continued refusal of the respondent to bargain with the Union.

C. Refusal to reinstate the strikers

The complaint alleges that on or about July 29, 1941, and at all times thereafter, the respondent discriminated with regard to the hire and tenure of employment of the employees listed in Appendix A, attached hereto, because of their membership in the Union and participation in the strike. Since, as

found above, the striking employees ceased work as a consequence of the respondent's unfair labor practices, they remained employees within the meaning of the Act and the respondent was under a duty not to discriminate in regard to their hire and tenure of employment.

As shown above, the Union's letter of July 25, 1941, requested a meeting with the respondent for the purpose of "reaching an agreement for the reinstatement" of the striking employees. In its reply of August 2, 1941, the respondent stated, in substance, that because the striking employees had refused to return to work their positions had been permanently filled by new employees who would not be displaced to afford positions for them. Thus, by this letter the respondent put the Union upon notice that the striking employees were no longer considered its employees and in fact, had been discharged and replaced by new employees. In discharging these employees, the respondent unlawfully discriminated in regard to their hire and tenure of employment.[14] By its letter of August 2, 1941, advising the Union of this action, the respondent precluded any possibility of the striking employees obtaining reemployment and thereby relieved them of the necessity of making formal ap-

(14) Black Diamond Steamship Corp. v. National Labor Relations Board, 94 F. (2d) 875 (C.C. A. 2) cert den. 304 U. S. 579; Great Southern Trucking Co. v. National Labor Relations Board, 127 F. (2d) 180 (C.C.A. 4); El Paso Electric Co. v. National Labor Relations Board, 119 F. (2d) 581 (C.C.A. 5).

plication, since such application, under the circumstances, would have been a "useless gesture."[15]

We find that the respondent on August 2, 1941, and thereafter, discriminated against the striking employees listed in Appendix A, thereby discouraging membership in the Union and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

## IV. The effect of the unfair labor practices upon commerce

We find that the activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. The remedy

Having found that the respondent has engaged in certain unfair labor practices, we shall order it to cease and desist from such practices and to take certain affirmative action designed to effectuate the

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(15) Matter of Eagle-Picher Mining & Smelting Company, a corporation, and Eagle-Picher Lead Company, a corporation, and International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108, and 111, 16 N.L.R.B. 727, mod. and enf'd, Eagle-Picher Mining & Smelting Company v. National Labor Relations Board, 119 F. (2d) 903 (C.C.A. 8).

policies of the Act. We have found that the respondent refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate bargaining unit. We shall, therefore, order the respondent, upon request, to bargain with the Union as such representative.

We have found further that the respondent discriminated against the employees listed in Appendix A, attached hereto, because they had gone on strike in protest against the respondent's unfair labor practices. We shall, therefore, order the respondent to offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges.[16] The reinstatement shall be effected in the following manner: All employees hired after April 30, 1941, the date of the commencement of the strike, shall, if necessary

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(16) Our order requiring reinstatement and back pay is based not only upon the fact that such an order is appropriate to remedy the respondent's unfair labor practices in discharging these employees but also, and independently, upon the ground that since the strike was caused and prolonged by the respondent's refusal to bargain collectively, an order requiring reinstatement with back pay is appropriate to effectuate the policies of the Act. National Labor Relations Board, v. American Manufacturing Co., 106 F. (2d) 61 (C.C.A. 2) aff'd 309 U. S. 629; National Labor Relations Board, v. Acme-Evans Co. (C.C.A. 7) decided June 15, 1942; Matter of McKaig Hatch Inc. and Amalgamated Association of Iron, Steel, and Tin Workers etc., 10 N.L.R.B. 33; Matter of Western Felt Works, a corporation and Textile Workers Organizing Committee, etc., 10 N.L.R.B. 407.

to provide employment for those who are to be reinstated, be dismissed. If, however, by reason of a reduction in force, there are not sufficient jobs immediately available for the remaining employees, including those who are to be reinstated, all available positions shall be distributed among such remaining employees in accordance with the respondent's usual method of reducing its force, without discrimination against any employee because of his union affiliation or activities, following a system of seniority to such extent as has heretofore been applied in the conduct of the respondent's business. Those employees thus laid off, for whom no employment is immediately available, shall be placed upon a preferential list prepared in accordance with the principles set forth in the previous sentence and shall, thereafter, in accordance with such list, be offered employment as it becomes available and before other persons are hired for such work. We will further order that the respondent make whole the employees listed in Appendix A, for any loss of pay they may have suffered by reason of the respondent's discrimination against them by payment to each of them of a sum of money equal to the amount which he would normally have received as wages from August 2, 1941, to the date of the respondent's offer of reinstatement, or placement, on a preferential list, less his net earnings,[17] if any, during such period.

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(17) By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Board makes the following:

## CONCLUSIONS OF LAW

1. Santa Ana International Typographical Union No. 579 is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All employees in the composing room of the respondent's Santa Ana plant, at all times material herein, constituted and now constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Santa Ana Typographical Union No. 579 was on March 1, 1940, and at all times since has been the exclusive representative of all the employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with Santa Ana Typographical Union No. 579 as the exclusive representative of its employees in the appropriate unit, the respondent has engaged in

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obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See Republic Steel Corporation v. National Labor Relations Board, 311 U. S. 7.

and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of the employees listed in Appendix A, thereby discouraging membership in the Union, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

6. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaged in unfair labor practices, within the meaning of Section 8 (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

## ORDER*

Upon the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Register Publishing Co., Ltd., Santa Ana, California, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Santa Ana International Typographical Union No. 579 or any other labor organization of its employees by discharging, refusing to reinstate, or in any other manner discriminating in regard to hire and ten-

ure of employment or any term or condition of employment of any of its employees;

(b) Refusing to bargain collectively with Santa Ana International Typographical Union 579 as the exclusive representative of all employees in the composing room of the respondent's Santa Ana plant;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Santa Ana International Typographical Union No. 579 as the exclusive representative of all the employees in the composing room of the respondent's Santa Ana plant in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Offer to the employees listed in Appendix A, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, such offer to be effected in the manner

provided for in the section entitled "The remedy", placing those employees for whom no employment is immediately available upon a preferential list in the manner therein set forth, and thereafter offer them employment as it becomes available;

(c) Make whole the employees listed in Appendix A for any loss of pay they may have suffered by reason of respondent's discrimination against them by payment to each of them of a sum of money equal to that which he normally would have earned as wages from August 2, 1941, to the date of the offer of reinstatement, or placement on a preferential list, less his net earnings during said period;

(d) Post immediately in conspicuous places at its Santa Ana plant and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a), (b), and (c) of this Order; and (3) that its employees are free to become or remain members of Santa Ana International Typographical Union No. 579, and the respondent will not discriminate against any employees because of membership or activity in that organization;

(e) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 7 day of October 1942.

WM. M. LEISERSON
Member
GERARD D. REILLY
Member
NATIONAL LABOR
[Seal] RELATIONS BOARD

APPENDIX A

| | |
|---|---|
| A. L. Berkland | G. L. Hawk |
| F. L. Berkland | J. W. Jones |
| C. W. Brakeman | L. C. McKee |
| William O. Bray | J. W. Parkinson |
| C. J. Bronzen | J. H. Patison |
| Charles Clayton | J. A. Sherwood |
| G. W. Duke | V. C. Shidler |
| E. W. Ellis | J. E. Swanger |
| W. H. Fields | E. Y. Taylor |

N.L.R.B. Docketed Oct. 7, 1942.

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[Title of Board and Cause.]

AFFIDAVIT AS TO SERVICE

District of Columbia—ss.

I, Robert B. Green, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 7th day of October, 1942, I mailed postcard, bearing gov-

ernment frank, by registered mail, a copy of the Decision and Order to the following named persons, addressed to them at the following addresses:

69798

Santa Ana International Typographical
Union No. 579
Att: J. W. Jones
837 N. Garnsey Street
Santa Ana, California

69799

Seth R. Brown
447 I. W. Hellman Bldg.
Los Angeles, California

69800

Register Publishing Company, Ltd.
Santa Ana, California

69801

Messrs. Willis Sargent and Paul Hart
433 South Spring Street
Los Angeles, California

ROBERT B. GREEN

Subscribed and sworn to before me this 7th day of October, 1942.

[Seal] KATHRYN B. HARRELL
Notary Public, D. C.

My Commission expires March 1, 1947.

[Return Receipts attached.]

[National Labor Relations Board Oct. 7, 1942. Docketed # 3.]

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 10364.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

REGISTER PUBLISHING CO., LTD.,
Respondent.

## PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 et seq.), respectfully petitions this Court for the enforcement of its order against respondent, Register Publishing Co., Ltd., Santa Ana, California, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Register Publishing Co., Ltd., and Santa Ana International Typographical Union No. 579, Case No. C-2225."

In support of this petition, the Board respectfully shows:

(1) Respondent is a California corporation, engaged in business in the State of California, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdic-

tion of this petition by virtue of Section 10 (e) of the Natonal Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, and including, without limitation, complaint and notice of hearing, respondent's answer to complaint, hearing for the purpose of taking testimony and receiving other evidence, Intermediate Report, respondent's exceptions thereto, and order transferring case to the Board, the Board, on October 7, 1942, duly stated its findings of fact, conclusions of law and issued an order directed to the respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Register Publishing Co., Ltd., Santa Ana, California, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Santa Ana International Typographical Union No. 579 or any other labor organization of its employees by discharging, refusing to reinstate, or in any other manner discriminating in regard to hire and tenure of employment or any term or con-

dition of employment of any of its employees;

(b) Refusing to bargain collectively with Santa Ana International Typographical Union 579 as the exclusive representative of all employees in the composing room of the respondent's Santa Ana plant;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Santa Ana International Typographical Union No. 579 as the exclusive representative of all the employees in the composing room of the respondent's Santa Ana plant in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Offer to the employees listed in Appendix A, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, such offer to be effected in the manner provided for in the sec-

tion entitled "The remedy", placing those employees for whom no employment is immediately available upon a preferential list in the manner therein set forth, and thereafter offer them employment as it becomes available;

(c) Make whole the employees listed in Appendix A for any loss of pay they may have suffered by reason of respondent's discrimination against them by payment to each of them of a sum of money equal to that which he normally would have earned as wages from August 2, 1941, to the date of the offer of reinstatement, or placement on a preferential list, less his net earnings during said period;

(d) Post immediately in conspicuous places at its Santa Ana plant and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a), (b), and (c) of this Order; and (3) that its employees are free to become or remain members of Santa Ana International Typographical Union No. 579, and the respondent will not discriminate against any employees because of membership or activity in that organization;

(e) Notify the Regional Director for the Twenty-first Region in writing within ten (10)

days from the date of this Order what steps the respondent has taken to comply herewith.

(3) On October 7, 1942, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Messrs. Willis Sargent and Paul Hart, respondent's attorneys in Los Angeles, California.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence and the proceedings set forth in the transcript, and the order made thereupon set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board and requiring respondent, and its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD
By ERNEST A. GROSS
Associate General Counsel

Dated at Washington, D. C., this 3rd day of February, 1943.

APPENDIX A.

| | |
|---|---|
| A. L. Berkland | G. L. Hawk |
| F. L. Berkland | J. W. Jones |
| C. W. Brakeman | L. C. McKee |
| William O. Bray | J. W. Parkinson |
| C. J. Bronzen | J. H. Patison |
| Charles Clayton | J. A. Sherwood |
| G. W. Duke | V. C. Shidler |
| E. W. Ellis | J. E. Swanger |
| W. H. Fields | E. Y. Taylor |

District of Columbia—ss.

Ernest A. Gross, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

ERNEST A. GROSS
Associate General Counsel

Subscribed and sworn to before me this 3rd day of February, 1943.

[Seal] JOSEPH W. KULKIS
Notary Public, District of Columbia

My Commission expires April 15, 1947.

[Endorsed]: Filed Feb. 9, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

## ANSWER OF RESPONDENT REGISTER PUBLISHING CO., LTD., TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, The Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Register Publishing Co., Ltd., Respondent in the above entitled matter, in accordance with Section 10(e) of the National Labor Relations Act (49 Stat. 449, Chapter 372, approved July 5, 1935), hereby answers the Petition presented to this Honorable Court for the enforcement of a certain Order of the National Labor Relations Board, hereinafter referred to as the "Board."

In answer to said Petition to this Honorable Court, Respondent respectfully admits, denies and alleges as follows:

(1) Admits the allegations contained in Paragraph (1) of said Petition to the extent that Respondent is a California corporation engaged in business in the State of California, within this judicial district, but denies the allegation that it committed any unfair labor practices, or that any unfair labor practices occurred by reason of Respondent or its operations, and further denies that this Court has jurisdiction of or over Respondent, or this Petition, by virtue of Section 10(e) of the National Labor Relations Act, or otherwise, for the

reason that the activities and operations of Respondent, whether as set forth by the Board in the Order sought to be enforced in this proceeding, or otherwise, do not have a close, intimate or substantial relation to trade, traffic or commerce among the several states, and do not lead, or tend to lead, to labor disputes burdening or obstructing commerce, or the free flow of commerce.

(2) Admits the allegations contained in Paragraph (2) of said Petition to the extent that proceedings were had in the said manner before the Board, and that on October 7, 1942, the Board did issue and direct its Order to Respondent in the language set forth in said Paragraph (2) of said Petition, but respondent denies that the Board had, or has, jurisdiction over Respondent, either for the purpose of proceeding against Respondent, or for the purpose of issuing or directing its Order to Respondent, or otherwise, in any manner whatsoever, for the reasons set forth in Paragraph (1) above of Respondent's answer to the Board's Petition.

(3) Admits the allegations of Paragraph (3) of said Petition.

(4) Admits the allegations of Paragraph (4) of said Petition, except that Respondent denies that the Board had, or has, jurisdiction over Respondent to so proceed under Section 10(e) of the National Labor Relations Act, or otherwise, as it is seeking to proceed by its Petition to this Court.

(5) In further answering the Board's Petition.

Respondent respectfully alleges that the Board's Findings of Fact as to those matters set forth in its Order for which it seeks enforcement from this Court, are not supported by the substantial and material evidence introduced and received at the trial; and that its Findings of Fact are inadequate, incomplete and insufficient in that important facts which are conclusively established by substantial and material evidence in the case, have been disregarded or ignored by the Board; and that its Conclusions of Law pertaining to the matters contained in its said Order, and the provisions set forth in its said Order, for which it seeks enforcement from this Court, are invalid and void as to Respondent, and based on improper, insufficient, and unsupported Findings of Fact, unwarranted by the substantial, material evidence contained in this case.

(6) Further answering the Board's Petition, Respondent respectfully alleges that it set forth in its Exceptions to the Intermediate Report of the Examiner who presided at the hearing, its objections to certain of his Findings, later adopted by the Board, to certain of his Conclusions of Law, also adopted by the Board, and certain of his Recommendations, later adopted by the Board, all as portions of the Order which it now seeks to enforce; that the Board erroneously, arbitrarily and in abuse of its discretion, overruled, disregarded and failed to take into consideration certain of Respondent's Exceptions to the said Intermediate Report of the Examiner; and that since the said Exceptions are part of

the record in this case, and are to be printed as part of the transcript record herein, Respondent hereby incorporates each and every objection therein contained insofar as applicable to the Order of the Board sought to be enforced herein and to the Findings of Fact and Conclusions of Law upon which the said Order is purported to be based, and as fully and completely as if entirely set forth herein.

(7) In further answering the Board's Petition, Respondent alleges that the said Order of the Board, and each and every part thereof, insofar as directed to compliance by Respondent, is invalid and void for the following reasons:

(a) That Paragraphs (1) and (2) of the said Order as drawn, if enforced, would deprive Respondent and its officers, agents, successors or assigns, of their freedom of speech and the freedom of press under Amendment 1 to the Constitution of the United States.

(b) That Paragraph (2) of said Order, as drawn, if enforced, would deprive Respondent of the protection of Amendment 5 to the Constitution of the United States, in that the National Labor Relations Act when construed under the requirement of the due process clause of said Amendment 5 to the Constitution of the United States, does not and could not authorize the Board to order and require Respondent to post notices either admitting, stating or implying that it had heretofore engaged in any unfair labor practices, or that it would cease and desist from engaging in any such unfair labor practices in the future.

Wherefore: Respondent prays that the Petition herein be dismissed, and that the Board's order, insofar as directed to Respondent, be set aside, and the Respondent be given such other and further relief in the premises as to the Court may seem just and proper.

Dated: This 19th day of February, 1943.

REGISTER PUBLISHING
CO., LTD.,
By C. H. HOILES
Treasurer
WILLIS SARGENT
Attorney for Respondent
610 Title Insurance Bldg.,
433 S. Spring Street,
Los Angeles, California
Telephone: MUtual 6171

(Duly verified.)

[Endorsed]: Filed Feb. 20, 1943. Paul P. O'Brien, Clerk.

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## ORDER TO SHOW CAUSE

CCA No. 10364

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To Register Publishing Company, Ltd., Santa Ana, California, and Santa Ana International Typographical Union No. 579, Att. J. W. Jones, 837 N. Garnsey St., Santa Ana, California,

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e) ), you and each of you are hereby notified that on the 9th day of February, 1943, a petition of the National Labor Relations Board for enforcement of its order entered on October 7, 1942, in a proceeding known upon the records of the said Board as

> "In the Matter of Register Publishing Co., Ltd., and Santa Ana International Typographical Union No. 579, Case No. C-2225."

and for entry of a decree by the United States Circuit Court of Appeals for the Ninth Circuit, was filed in the said United States Circuit Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Circuit Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 9th day of February in the year of our Lord one thousand, nine hundred and forty-three.

[Seal] PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Marshal's Civil Docket No. 25347 Vol. 46 Page 9.

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of California—ss.

No. 25347

I hereby certify and return that I served the annexed Order to show cause and copies of petition for enforcement order on the therein-named Register Publishing Company and Santa Ana International Tpyographical Union No. 579 by handing to and leaving a true and correct copy thereof with C. H. Hoiles, Sec.-Treas. Register Publishing Co. & J. W. Jones, Past Pres. Santa Ana International Typographical Union #579 personally at Santa Ana & Norwalk in said District on the 11th day of February, 1943.

ROBERT E. CLARK
U. S. Marshal
By THOS. R. KEEFE
Deputy

[Endorsed]: Filed Mar. 1, 1943. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Twenty-first Region

Case No. XXI-C-1737

In the Matter of:

REGISTER PUBLISHING COMPANY, LTD.,

and

SANTA ANA INTERNATIONAL TYPOGRAPHICAL UNION, LOCAL NO. 579.

TRANSCRIPT OF TESTIMONY

Council Chambers, City Hall,
Santa Ana, California,

Thursday, May 7, 1942.

The above-entitled matter came on for hearing, pursuant to notice, at 10:30 o'clock a. m.

Before:

WILL MOSLOW, Trial Examiner.

Appearances:

Charles M. Ryan,

Attorney for the National Labor Relations Board.

Willis Sargent and Paul Hart,

433 South Spring Street, Los Angeles, California, appearing for the Register Publishing Company, Ltd.

Seth R. Brown,

447 I. W. Hellman Building, Los Angeles, California, Special Representative for the Santa Ana International Typographical Union, Local 579. [1*]

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SETH R. BROWN,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ryan:

Q. State your full name, please, Mr. Brown.

A. Seth R. Brown.

Q. What is your address?

A. 447 I. W. Hellman Building, Los Angeles.

Q. That is your office address?

A. Yes, sir.

Q. What is your occupation?

A. I am a representative of the International Typographical Union.

Q. In what particular capacity is that representation?

A. Well, I have charge of their affairs in the southwest and Southern California, Arizona and Nevada.

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*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Seth R. Brown.)

Q. How long have you held that position, Mr. Brown?

A. This particular position I have held for two years. [10]

Q. Since 1940?

A. Yes, sir; since the first of March, 1940.

Q. Prior to that had you any connection with the International Typographical Union?

A. Yes, sir. I was first vice-president of the International Typographical Union from 1924 to 1928. I was also a trustee of the Union Printers Home for one term.

Q. Where is that?

A. In Colorado Springs, Colorado.

Q. Between 1928 and March 1, 1940, what was your occupation?

A. I was director of the State Employment Agencies under Governor Young for three years, from 1928 to 1931.

Q. Governor Young is from what state?

A. The State of California; and after that I was employed in the composing room of the Los Angeles Examiner up until the first of March, 1940.

Q. When did you first become associated with the International Typographical Union in any capacity? Your very first association?

A. You mean my membership?

Q. Yes.

A. I joined the organization in November, 1896.

Q. And prior to your obtaining the vice-presi-

(Testimony of Seth R. Brown.)

dency that you say you obtained in early 1920, I believe? A. Yes, 1924. [11]

Q. Had you held any other executive position with the union prior to that?

A. Not with the International. I was local president of the Los Angeles Typographical Union from 1914 to 1924.

Q. Are you familiar with the history of the International Typographical Union?

A. Well, more or less, yes, sir, over a period of years.

Q. Can you give us a brief outline as to the coming into existence of the International Typographical Union?

Mr. Sargent: Well, I have no desire to object to anything that counsel wants to bring in that has a bearing on the case, but we have already admitted in our answer that the Typographical Union is a proper labor organization, and I don't believe it is going to help us much to go into the details of its organization.

Trial Examiner Moslow: What is the purpose of this line of questioning, Mr. Ryan?

Mr. Ryan: Mr. Examiner, certain issues with respect to the allegation that the company refused to bargain in good faith which, in order to be properly understood, will have to have this information for a background. At least that is my intention, and I insist on the right to bring it out. If, in the mind of the Examiner and opposing counsel, at the end of this little examination, it is found

(Testimony of Seth R. Brown.)

to be not revelant, I say at that time there can be a motion to [12] strike.

Mr. Sargent: Mr. Examiner, the issue here is whether or not this company, respondent, did actually bargain in good faith. The past history of the union has nothing to do with the question.

Trial Examiner Moslow I will overrule the objection and receive this line subject to connection.

Mr. Sargent: It is understood my objection covers the whole line of questioning?

Trial Examiner Moslow: You may have a continuing exception and objection to the entire line.

Mr. Ryan: Read the question, please.

(The question was read.)

The Witness: The International Typographical Union was organized in 1852 at Cincinnati. Later on, in 1869, the name was changed from the National Typographical to the International Typographical Union, and the jurisdiction extended to take in the Dominion of Canada. Previous to that it had been a national organization.

The International Typographical Union, of course, has affiliated local units, and these units make up in the aggregate very nearly 1,000 local units throughout the United States and Canada, and one in Hawaii.

I don't know, Mr. Examiner, whether you want me to go ahead with the general outline, or you want to ask questions. [13]

Mr. Ryan: I will ask you questions.

(Testimony of Seth R. Brown.)

Q. (By Mr. Ryan): What employees does the jurisdiction of the International Typographical Union extend to?

A. Well, to printers and mailers.

Q. In what industry?

A. In the printing industry.

Q. Since the International Typographical Union came into existence has it secured contracts with substantial numbers of companies engaged in the printing industry throughout the United States?

Mr. Sargent: So stipulated.

Q. (By Mr. Ryan): Can you give us——

Trial Examiner Moslow: Just one second. I don't understand by virtue of a stipulation that you can prevent a counsel from asking his questions. Are you willing to take that stipulation in lieu of information, or do you want to proceed?

Mr. Ryan: I will take that stipulation as an answer to that question.

Trial Examiner Moslow: Very well; so stipulated.

Q. (By Mr. Ryan): Can you give us an approximate idea as to the number of contracts?

Trial Examiner Moslow: Mr. Ryan, can't you frame your questions more precisely, so that they will get to the issue? I don't think the entire history of the organization is going to be relevant. No one disputes that it is a labor organiza- [14] tion.

Q. (By Mr. Ryan): Well, are there certain provisions in the contracts which you have throughout the industry that are uniform?

(Testimony of Seth R. Brown.)

A. Yes, many of those—the mandatory laws of the International Typographical Union, in fact, all of them, are incorporated in standard contracts. Especially in smaller unions and smaller offices the contracts are more standard, but in the larger offices, of course, there are a number of working conditions that are not mandatory on behalf of the typographical union, which are negotiated.

Mr. Ryan: Will you mark this for identification as Board's Exhibit 3?

(Thereupon the document referred to was marked as Board's Exhibit No. 3, for identifiaction.)

Q. (By Mr. Ryan): Mr. Brown, I show you a document marked Board's Exhibit 3 for identification which is entitled "Book of Laws of Internatioanl Typographical Union", in effect January 1, 1942, and ask you whether or not those are the laws of the International Typographical Union now in effect? A. Yes, sir.

Mr. Sargent: What was the date on that, please?

The Witness: 1942; in effect January 1, 1942.

Mr. Ryan: I offer this as Board's Exhibit 3 in evidence.

Mr. Sargent: I object to it on the ground that the [15] issues of this case were formed prior to January 1, 1942, and that a book which came into effect in that year, January 1, 1942, would not be applicable to the issues of this case.

Trial Examiner Moslow: What is your point, Mr. Ryan?

(Testimony of Seth R. Brown.)

Mr. Ryan: Well, my point is to establish the rules and regulations by which the international union is now in existence, and guided by, and governed by, and, so far as Mr. Sargent's objection, I propose to introduce the previous set of by-laws also. Do you have them with you, Mr. Brown?

The Witness: I haven't them with me, Mr. Ryan, but they can be obtained.

Mr. Ryan: Can you get them for us by noon?

The Witness: I think so. I am sure the local union has a copy of last year's laws.

Trial Examiner Moslow: I will reserve my ruling meanwhile on Board's Exhibit 3 for identification.

Q. (By Mr. Ryan): Mr. Brown, in your present capacity as a representative of the Typographical Union have you had any occasion to represent or deal in behalf of the Santa Ana International Typographical Union here in Santa Ana, in so far as relations between that union and the Register Publishing Company, Ltd. is concerned?

Mr. Sargent: I have no objection to his giving specific dates or instances. I take it all you want to do now is to make it an introductory question. Is that correct? [16]

Mr. Ryan: That is right.

Mr. Sargent: All right.

The Witness: The Santa Ana International Typographical Union requested the president of the International Typographical Union to assign a

(Testimony of Seth R. Brown.)

representative here to assist the local union in its scale negotiations.

Q. (By Mr. Ryan): When was that?

A. That was in March.

Trial Examiner Moslow: What year?

The Witness: In 1940. It might have been the last of February or the first of March, 1940.

Q. (By Mr. Ryan): Were you assigned to this Santa Ana International Typographical Union, Local 579, pursuant to that? A. Yes, sir.

Q. What was the occasion of your coming here to represent the Santa Ana International Typographical Union?

Mr. Sargent: I have no objection to his testimony providing he knows. I don't want any hearsay as to what other union people have told him.

Trial Examiner Moslow: Will you reframe the question, Mr. Ryan?

Q. (By Mr. Ryan): Do you know of your own knowledge the reasons for your coming here to represent the Santa Ana International Typographical Union? [17] A. Yes, sir.

Q. What were they?

Mr. Sargent: Unless the management, the Santa Ana Register, was in some way present or was notified of these reasons, they wouldn't be binding upon respondent, and they would be hearsay. I am therefore going to ask that the testimony be limited to such things as are competent evidence, having come to the attention of the respondent.

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: I will sustain your objection. Reframe your question.

Q. (By Mr. Ryan): Mr. Brown, you have already testified that you came to Santa Ana in March, 1940, having been designated to represent the Santa Ana International Typographical Union, by the president of the International. Is that right?

A. Yes, sir.

Q. Did you come here to Santa Ana pursuant to that? A. Yes, sir.

Q. After you got to Santa Ana, did you proceed to represent the Santa Ana International Union in any dealings with the Register Publishing Company, Ltd.?

A. I proceeded to cooperate with the local scale committee of the Typographical Union, assist them.

Q. In what respect?

A. In negotiations with the management of the Register in reference to a new contract. [18]

Mr. Sargent: Mr. Ryan, I don't want to object to anything that will impede your testimony. I would like to have specific things brought out here, rather than general conclusions, if I may. In other words, tell what he did, and then we can draw conclusions as to whether he did or didn't assist, or what he did.

Q. (By Mr. Ryan): Had these negotiations referred to by you commenced before you came to Santa Ana?

A. One meeting had been held and that was the reason for my being brought into the case.

(Testimony of Seth R. Brown.)

Mr. Sargent: I ask that that go out as being incompetent evidence.

Trial Examiner Moslow: I will let it stand, but please confine your answers to the question, Mr. Brown.

Q. (By Mr. Ryan): As a representative of the Santa Ana International Union, did you attend any conference with representatives of the Register Publishing Company in March, 1940?

A. Yes, sir.

Q. When did you first attend such a conference?

A. Well, March 20th and 27th, I believe was the two dates in that month.

Q. The first one was on March 20th?

A. Yes, sir.

Trial Examiner Moslow: 1940? [19]

The Witness: 1940.

Q. (By Mr. Ryan): Where was that meeting held?

Mr. Sargent: Just a minute, please. The Board has charged here that certain unfair labor practices took place in the year 1940. Is it your idea, Mr. Ryan, to show that those are connected with the situation that developed in 1941?

Mr. Ryan: Yes.

Mr. Sargent: Unless there's a connecting link, in view of the fact the evidence will indicate that there was a verbal contract in effect during the year 1940, and that the break-off of relations did not come until 1941, I ask the testimony be limited to such time as the negotiations which ended

(Testimony of Seth R. Brown.)

in the economic action in 1941. We do not go back to 1940 as a result of which there was an agreement between the union and the respondent.

Trial Examiner Moslow: I do not understand your contention. Was there a contract signed in 1940 between the parties?

Mr. Sargent: There was no contract signed, but there were operations under a verbal agreement, as I understand it, in 1940.

Trial Examiner Moslow: Do you object to any evidence on unfair labor practices prior or after the contract? What is your point? Or, is it prior to the execution of this [20] oral agreement?

Mr. Sargent: I think everything that has taken place prior to the verbal agreement was merged in the agreement.

Trial Examiner Moslow: If that is your objection, it is overruled.

Q. (By Mr. Ryan): Prior to March 1, 1940, do you know of your own knowledge whether or not the Santa Ana International Typographical Union, Local 579, had had a contract agreement with the Register Publishing Company, Ltd.?

A. They had an agreement, yes, sir, an oral agreement.

Q. Do you know what employees were covered by that agreement?

A. All employees in the composing room.

Q. Exclusive of all other employees in other departments? A. Yes, sir.

Q. Do you know when the first contract was

(Testimony of Seth R. Brown.)

entered into between the Santa Ana International Union and the Register Publishing Company?

A. The last one?

Q. The first one?

A. Well, I would judge—the union was chartered in November, 1909, and shortly afterwards the first contract was entered into. I could not give the exact time.

Q. Was the Register newspaper owned by the Register Publishing Company, Ltd. then, in 1909?

A. I don't know the name, whether they went under the Register [21] Publishing Company or not. It is owned by J. P. Baumgartner, under what name I am not familiar with.

Q. And was there a continuous contractual relationship between the Santa Ana Union and the owner of the Register from 1909, during the ownership of Mr. Baumgartner? A. Yes, sir.

Q. And when did the ownership change, or did it change?

A. I think it changed first along in '28 or '29, '28 or '29, when J. Frank Burke purchased the paper from Mr. Baumgartner.

Q. Did the same employees continue to work, do you know?

A. Well, our employees changed from year to year, Mr. Ryan. That is, some come and some go; but the composing room was maintained under the same conditions, so far as the management and the union was concerned.

(Testimony of Seth R. Brown.)

Q. Santa Ana Union continued to have relations with Mr. Burke and Mr. Baumgartner?

A. Yes, sir.

Q. Covering the composing room?

A. Yes, sir.

Q. Do you know when the present management and owner became the publishers of this Register newspaper?

A. I couldn't give you the exact date, but I think it was about 1935, or 1934.

Mr. Ryan: Will you stipulate, counsel, it was 1935?

Mr. Sargent: 1935. [22]

Trial Examiner Moslow: So stipulated?

Mr. Sargent: Yes.

Trial Examiner Moslow: Very well.

Mr. Ryan: Read the question.

(The question was read.)

Q. (By Mr. Ryan): Did the Santa Ana Union continue to have contractual relationship covering the composing room of that newspaper after the present owner of the Register Publishing Company, Ltd. took over, in 1935? A. Yes, sir.

Q. How long did those contractual relations continue between the Santa Ana union and the Register Publishing Company?

Mr. Sargent: I object to that question as calling for a conclusion, and assuming a fact not in evidence.

Trial Examiner Moslow: I will sustain the objection.

(Testimony of Seth R. Brown.)

Q. (By Mr. Ryan): At any time since the inception of the ownership of the Register Publishing Company, over the Register newspaper, did the Santa Ana International Typographical Union enter into a contract with the publishing company?

A. They entered into a contract in 1937.

Trial Examiner Moslow: Was that oral or written?

The Witness: It was an oral contract.

Q. (By Mr. Ryan): Are the terms set out in writing, however? A. Yes, sir.

Q. Do you have a copy of that contract? [23]

A. I think there is one available there.

Q. The terms of the contract were set out in a written document. Is that right?

A. Yes, sir.

Q. Was the written document signed by either party?

A. No, it wasn't. They were not signed.

Mr. Ryan: Mr. Examiner, I find I do not have a copy of that contract, but request the respondent to produce the copy of the contract.

Mr. Sargent: We haven't been called on to produce, and we haven't got one here, Mr. Ryan.

Mr. Ryan: Well, can you produce it by this afternoon?

Mr. Sargent: I don't think we have one. We will look and see; glad to cooperate, if we can.

Mr. Ryan: You will stipulate, however, that there was a contract? Is that right?

(Testimony of Seth R. Brown.)

Mr. Sargent: Yes, we will stipulate there was an oral contract in or about 1937, the terms of which were verbal, but had been reduced to writing.

Trial Examiner Moslow: Is that stipulated, Mr. Ryan?

Mr. Ryan: Yes.

Trial Examiner Moslow: Very well.

Mr. Ryan: Will you also stipulate that the contractual relationship between the company and the union continued until March 1, 1940? [24]

Mr. Ryan: I won't stipulate in that form, no. I will stipulate at all times there have been contractual relationships between the parties hereto.

Trial Examiner Moslow: We will discuss this for a minute further off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record. As a result of an off the record discussion it is agreed between parties that the oral agreement described as having been executed in 1937 continued with minor modifications until March 1, 1940; that the parties are in dispute as to whether or not it continued after March 1, 1940.

Mr. Ryan: So stipulated.

Mr. Sargent: Your Honor, I have no hesitancy in agreeing to your stipulation, except that my client objects to the inference that there was a change in March of 1940.

Trial Examiner Moslow: I understand. You contend there was no change and the Board con-

(Testimony of Seth R. Brown.)

tends there was a change, but you are both in agreement that up until March 1, 1940 there was an oral contract. Is that correct?

Mr. Sargent: That is right.

Trial Examiner Moslow: The stipulation is so received and so understood.

Q. (By Mr. Ryan): Now, in this meeting between the union and the Register Publishing Company that took place March 20, [25] 1940, you say you were present? A. Yes, sir.

Q. Who else was present representing the union?

A. Well, the then president of the local union, Mr. E. Y. Taylor.

Q. President of the Santa Ana International Typographical Union, No. 579?

A. Yes, sir.

Q. Anyone else present on behalf of the union, Mr. Brown? A. No, sir.

Q. Who was present representing the company?

A. Mr. C. H. Hoiles and Mr. Hanna, I think it is E. J. Hanna.

Q. Do you know what position Mr. C. H. Hoiles occupies at the Register Publishing Company?

A. Not exactly.

Mr. Sargent: Did occupy at the time, Mr. Ryan?

Mr. Ryan: At that time, yes.

Trial Examiner Moslow: Will you state for the record, Mr. Sargent, what position he did occupy at the time?

Mr. Sargent: Secretary-treasurer, then and now.

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: Is that agreed, Mr. Ryan?

Mr. Ryan: Yes.

Mr. Sargent: And in charge of all business for the company.

Trial Examiner Moslow: How about Mr. Hanna? [26]

Mr. Sargent: Hanna at that time was business manager under Mr. Hoiles.

Trial Examiner Moslow: Is that agreed, Mr. Ryan?

Mr. Ryan: That is agreed.

Trial Examiner Moslow: Very well. Let us continue.

Q. (By Mr. Ryan): Will you tell us what took place at that meeting? What was said by the various parties? What the nature of the meeting was?

A. The union had requested a 15 cent increase per hour and a week's vacation with pay.

Trial Examiner Moslow: How much of an increase?

The Witness: 15 cents an hour, and there is a few minor changes in the other agreement, the rest of the agreement, but the wages, and the vacations, were the main points put forth.

Mr. Ryan: Will counsel for the respondent stipulate that these contracts which had been in effect from the inception of the ownership of the Register Publishing Company, Ltd., have covered the composing room employees, and that that was the unit of employees covered?

(Testimony of Seth R. Brown.)

Mr. Sargent: Yes.

Trial Examiner Moslow: Very well; so stipulated.

Mr. Sargent: You are referring now to the particular oral agreements, not to exclude any others?

Mr. Ryan: That is right. [27]

Mr. Sargent: Yes. I stipulate to that.

Q. (By Mr. Ryan): Will you tell us what was said at the meeting on March 20th, by yourself and by the other parties involved, indicating each one as you quote him?

A. I called attention to the general increase in wages around in many of the local unions and that our contention was that the scale in Santa Ana was abnormally low compared with the average scale in organized cities.

Q. What was the scale being paid at this time out in Santa Ana newspapers in the composing rooms?

A. They were paid $1.00 an hour, 37½ hours a week.

Q. Well, were the union's proposals for increases in wages and this proposal with respect to vacations, acceptable to the representatives of the company? A. No, sir.

Q. Just tell us what happened with respect to those proposals. Did you discuss them with representatives of the company, Mr. Hoiles and Mr. Hanna?

A. Yes. We discussed the subjects at both our March meetings.

(Testimony of Seth R. Brown.)

Q. What was said at the first meeting with respect to wage increases by the management? Did Mr. Hoiles say anything?

A. Well, he took a position that that—that they wouldn't pay any more money. But I don't just recall if it was on that occasion that we spoke about the effect on the other [28] employees in the institution. I think that was at a later date. But we discussed the general wage situation and the counter-proposal that the office had submitted to the union. That was brought up.

Q. These proposals for wage increases in the meeting,—with respect to vacations, had they been submitted by the union to the management prior to this March 20th meeting?

A. Yes, sir.

Q. When had they first been submitted to the company, if you know, by the union?

A. About the first of March, the latter part of February, in 1940.

Q. And prior to March 20th, when you entered the negotiations, had a previous meeting been held with representatives of the company by the union?

A. One meeting had been held.

Q. You did not attend that meeting, however?

A. No, sir.

Q. Prior to your entering the negotiations on March 20th, had the company submitted counter-proposals to the union with respect to wages?

A. They submitted a counter-proposal, seven points.

(Testimony of Seth R. Brown.)

Q. Can you tell us what those seven points were?

A. Offhand I couldn't tell them in the language as expressed, but they did refer to the payment of 75 cents an hour for what [29] was termed straight matter operators, no discrimination between union and non-union workmen——

Trial Examiner Moslow: Slower.

The Witness: Beg pardon?

Trial Examiner Moslow: Slower.

The Witness: And——

Mr. Sargent: 75 cents per hour for straight what?

The Witness: Straight matter operators.

Mr. Sargent: Thank you.

The Witness: The privilege of working their employees four hours a day instead of a full complement of hours, complete jurisdiction over the apprentices both as to the number to be employed and as to the work they should perform from year to year; and I think the week was staggered into seven—five seven-hour days, and one five-hour day.

Q. (By Mr. Ryan): With respect to straight matter operators, what do you mean by that term?

A. That was a term used by the publishers in their counter-proposition. What they intend to infer I imagine is the operators who operate on straight news matter instead of what we call ad composition and liners and baseball scores and so forth, that take more qualified men to perform than it does the straight matter operators.

Q. This proposal with respect to 75 cents an

(Testimony of Seth R. Brown.)

hour for straight matter, was it a decrease from the scale in effect [30] at that time in the shop?

A. A decrease of 25 cents an hour.

Q. Was the union asking for 15 cents increase an hour for that type of operation?

A. Yes, sir.

Q. Which would mean $1.15 an hour?

A. Yes, sir.

Q. You stated that the company in its counter-proposals demanded a complete control of apprentices. Is that right? A. Yes, sir.

Q. Well, explain what is meant by the term "apprentices" as it was used in these negotiations between the union and the company.

A. Well, boys who were learning the printing industry, and must serve an apprenticeship of six years; the first year they are under the control of the office, and at the end of the first year they have —if they have proven competent, they are registered apprentices of the International Typographical Union, and are compelled to take the I. T. U. course in printing.

Q. By "I. T. U. course" what do you mean?

A. It's a course in trade publications to enlighten the apprentices on the various elements of the printing craft and the composing room.

Q. I. T. U. are the initials for the International Typographical [31] Union? Is that what you have reference to? A. Yes, sir.

Trial Examiner Moslow: What do you mean,

(Testimony of Seth R. Brown.)

that the apprentices must serve an apprenticeship of six years?

The Witness: Before they are eligible to become members of the International Typographical Union.

Trial Examiner Moslow: That is a rule of the union?

The Witness: Yes, sir.

Q. (By Mr. Ryan) After they have served an apprenticeship of six years what term is applied to them then?

A. If they are acceptable and are qualified, they are made journeymen members of the union. In other words, they are transferred from the apprenticeship list to the journeymen list of the union.

Q. In the union's contracts with employers throughout the printing industry, are there provisions in the contract with respect to training of apprentices?

A. Well, each—many contracts vary in that. They have various stipulations. As a rule the contract provides the work that the boys shall perform from year to year, the idea being to give him a good idea of all of the various departments in the composing room, with the stipulation that he must be given an apprenticeship upon the typesetting machines during the last year of his apprenticeship.

Q. Can you give us an outline of the various operations [32] that are performed in the composing room of the Santa Ana newspaper?

A. You would have your machine operators, your

(Testimony of Seth R. Brown.)

make-up employees, your ad men, bank men, make-up men, and apprentices.

Q. Now, in the training——

Mr. Sargent: Just a minute. The first one was what?

The Witness: Operators, machine operators.

Mr. Sargent: Thank you.

Q. (By Mr. Ryan) In the training of these apprentices over a period of six years, are they trained in the various duties that you have outlined?

A. Yes, sir.

Q. Has there been any different custom established by the International Typographical Union and the newspaper companies which operate under contract with that union, with respect to apprenticeship regulations throughout the industry?

Mr. Sargent: Don't answer that, please. Excuse me, Mr. Ryan. Had you finished?

Mr. Ryan: Yes.

Mr. Sargent: I object to that on the ground that there is no foundation laid showing any general custom was made in any association.

Trial Examiner Moslow: I will overrule the objection.

Mr. Sargent: Read the question.

(The question was read.) [33]

Mr. Sargent: Mr. Examiner, further in objection to this question, it opens up a field which leads to speculation as to what might be the general rule, and what might be the exception could not be ob-

(Testimony of Seth R. Brown.)

tained without going into a series of other contracts which are not before us and can't be before us without greatly prolonging the case.

I have no objection to what was said in respect to this case, in any conference that took place between the union and the management, and any custom apart from that should not be permitted to come into the case.

Trial Examiner Moslow: We will discuss this further off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

We have had an off-the-record discussion as to the contention of the Board on a particular point. I want to state for the record that any time discussions are held off the record, if any of the parties wishes it reproduced or summarized on the record, that may be done. The sole purpose of going off the record is to conserve and shorten the record.

Mr. Sargent: I would state, in that connection that I simply want this one remark upon the record: That we draw attention to the difference between the training of the apprentices under the I. T. U., as the parent organization, and the control of the number of apprentices, and the particular [34] duties for the employees, in respondent's and other shops.

Trial Examiner Moslow: Read the question.

(The question was read.)

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: The objection is overruled as to that question.

The Witness: You mean the formation of a mutual committee to take care of the apprenticeship question in the particular community or office?

Q. (By Mr. Ryan) Mutual agreement as to what method of training should be accorded to the apprentices from year to year, so that they will eventually develop into full-fledged and well trained journeymen.

A. That is a matter of negotiations between the local publisher and the local union, but you understand the restrictions are that the boy cannot perform any work on a typesetting machine except during the last year of his apprenticeship. The other years his work is divided up and agreed upon, where he shall work in certain years, between the office and the union at the time the contract is signed, or previous to it.

Q. Are there certain rules in the by-laws of the International Union with respect to training of the apprentices?

A. No, there is no set provision, Mr. Ryan.

Q. Is there anything in the by-laws of the International Union which will restrict the International Union from [35] entering into a contract with a company, which gives the company exclusive and absolute right to control the apprentices working in the shop, in all respects——

Mr. Sargent: Just a minute, before you answer. Have you finished?

(Testimony of Seth R. Brown.)

Mr. Ryan: In all respects to their employment and training.

Mr. Sargent: I object to the question as assuming facts not now in evidence and therefore not applicable to this case. There has been no testimony indicating that this management had insisted upon any such wide control as is assumed by the question.

Trial Examiner Moslow: The objection is overruled. Do you understand the question?

The Witness: I understand to this extent: That in the counter-propostion submitted by the——

Trial Examiner Moslow: That is not the question. The question is as to the by-laws. Read the question.

(The question was read.)

Mr. Sargent: Further, Mr. Examiner, I understand now from the question that this is a contract with the International which is not involved at all in this case.

Trial Examiner Moslow: My ruling is the same.

The Witness: Well, the control of apprentices is under control of the International Typographical Union, and through [36] the local union.

Trial Examiner Moslow: The question, Mr. Brown, is: Is there anything in your by-laws on the subject?

The Witness: You mean any specific reference to it?

Trial Examiner Moslow: That is right.

(Testimony of Seth R. Brown.)

The Witness: I couldn't say, Mr. Examiner.

Mr. Ryan: I will withdraw the question for the time being.

Q. (By Mr. Ryan) Are the local units affiliated with the International Typographical Union, free to enter into any type of contract that they may desire, irrespective of the by-laws of the International Union? A. No, sir.

Mr. Sargent: I take it that answer—the question is asking for this witness' opinion only? Is that correct, Mr. Ryan?

Mr. Ryan: I think I have qualified him as an expert witness, in so far as the union is concerned, inasmuch as he has been connected with it for a great many years in an official capacity.

Q. (By Mr. Ryan) Getting back to this March 20, 1940, meeting, what discussion did you have with respect to the company's proposal on apprentices? What further discussion did you have?

A. We had a discussion—— [37]

Q. Tell us what Mr. Hoiles said. If he said anything on that point tell us what he said about it, as best you can.

A. His position was that the boys should be permitted to work on a machine before the six years of apprenticeship.

Q. Did he say that? A. He——

Trial Examiner Moslow: What kind of a machine?

The Witness: Typesetting machine.

Q. (By Mr. Ryan) Did he say that?

(Testimony of Seth R. Brown.)

A. Yes, sir.

Q. Was that agreeable to the union?

A. No, sir.

Q. Can you state—did you say anything in reply to Mr. Hoiles on that point?

A. I quoted the law in reference to the International law that an apprentice could not work on a typesetting machine, except in the last year of his apprenticeship.

Q. Can you find that law in the constitution and by-laws of the International Union?

A. I think I could find it, yes.

Q. I show you the copy of the by-laws and constitution, which is in evidence as Board's Exhibit 3——

Trial Examiner Moslow: It is not in evidence yet.

Mr. Ryan: I am sorry—— [38]

Mr. Sargent: I will have to object unless it is shown that particular provision, if there be one, was in effect in 1940. Here you have one which shows January 1, 1942, and it was 21 months subsequent to the time we are discussing. Have I made my objection clear?

Trial Examiner Moslow: That is right. Mr. Ryan, suppose you have reference to that during the lunch recess, and let's proceed.

Q. (By Mr. Ryan) Mr. Brown, what further discussion did you have with respect to apprenticeship? Did you have any further discussion on that point at the March 20th meeting?

(Testimony of Seth R. Brown.)

A. Well, in general the discussion was around the fact that the office desired to have a boy perform any work which they thought he should do in the composing room, instead of being restricted as to work performed from year to year.

Mr. Sargent: I don't object to that because I presume that is what Mr. Hoiles stated.

Trial Examiner Moslow: Is that what you contend Mr. Hoiles stated?

The Witness: Yes, sir.

Q. (By Mr. Ryan) And by "boy" you have reference to an apprentice?

A. Apprentice, yes, sir.

Q. With respect to the matter of the company's offer as to [39] 75 cents an hour for straight matter operators, what did the union representatives state in that respect? You, particularly?

A. They were opposed to the suggestion for the specific reason that all scales made by the union are the minimum scales. They are supposed to cover any employee of the composing room, any competent employee, and that does not prevent the employer from paying over the scale, if he so desires. But in no cases did they differentiate between operators.

Q. At that time had the union set up a minimum scale with respect to operators?

A. They were working under a dollar an hour for a minimum scale for each one in the composing room.

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: What do you mean by no differentiation in the operators?

The Witness: A minimum between what they term straight matter operators and the skilled operator on ad display, etc.

Mr. Ryan: If the Examiner please, it is 12:00 o'clock and it is convenient for me to recess for noon, inasmuch as I desire to get the constitution and by-laws.

Trial Examiner Moslow: Very well. We will recess until 1:30.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:30 o'clock p.m., of the same day.) [40]

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AFTERNOON SESSION

(The hearing was reconvened at 1:30 o'clock p.m.)

SETH R. BROWN,

resumed the stand as a witness for the National Labor Relations Board, having been previously duly sworn, and testified further as follows:

Direct Examination
(Continued)

Trial Examiner Moslow: The hearing will come to order.

Mr. Ryan: May I please have the last question?

(The record was read.)

Q. (By Mr. Ryan) Mr. Brown, I previously

(Testimony of Seth R. Brown.)

asked you whether there was anything in the by-laws of the Typographical Union which would prevent it from accepting the proposal made by the Register Publishing Company with respect to apprentices.

A. There were several sections——

Mr. Sargent: Just a minute, please. Are you finished?

Mr. Ryan: Yes.

Mr. Sargent: I object to the witness answering unless during the conversations he so told the management.

Trial Examiner Moslow: The objection is overruled.

Mr. Sargent: Mr. Examiner, do I understand that whatever was a part of their internal organization, that was binding on the management, without their being shown it?

Trial Examiner Moslow: Whether or not it was binding, I will receive the evidence. [41]

Mr. Ryan: Mark this, please, as Board's Exhibit 4 for identification.

(Thereupon the document referred to was marked as Board's Exhibit No. 4, for identification.)

Q. (By Mr. Ryan) Mr. Brown, I show you what is marked Board's Exhibit 4 for identification, which purports to be a book of laws of the International Typographical Union in effect January, 1940, and ask you whether or not that is a copy of the

(Testimony of Seth R. Brown.)

laws of the International Typographical Union in effect as of the date showing on the outside of the cover? A. Yes, sir.

Mr. Sargent: What was the answer to that?

The Witness: Yes, sir.

Mr. Ryan: I offer Board's Exhibit 4 in evidence.

Mr. Sargent: Mr. Examiner, there has been no foundation here during any of the testimony thus for that, during these negotiations, these laws were made known to the management, that the management—that they should be a part of any verbal agreement or any future agreement, or that they played any part in the negotiations. Until such time as we have foundations for it, the mere introduction of this book is prejudicial to the respondent, without having given him an opportunity at any time during the negotiations to know what was in them, whether they precluded or did not preclude [42] objections to any rules.

Trial Examiner Moslow: The objection is overruled. Mr. Brown, were the by-laws in effect at the time of the negotiations in 1940?

The Witness: Yes, sir.

Mr. Sargent: I respectfully object to your Honor's question unless they were known to the respondent.

Trial Examiner Moslow: I am not asking at the moment the question of whether or not the respondent was bound by these by-laws, or what the effect of these by-laws were upon the negotiations, but I am receiving them for the purpose stated,

(Testimony of Seth R. Brown.)

namely: To know what was the by-laws, and whether the local union considered itself bound, regardless of whether that position was made known to the respondent.

Mr. Sargent: But, your Honor, I submit to you that it has no bearing upon the case, unless the union made it known to the respondent that it was bound, or its authority was limited, or in some way brought home to the management that here was something upon which the union didn't have a free hand. [343]

Trial Examiner Moslow: You must distinguish, Mr. Sargent, between my receiving of evidence in the threshold of this hearing, and my making a ruling that evidence is binding against you. I can't determine at this stage whether the by-laws would be binding, but I am disposed to receive them.

Perhaps before the end of the hearing a motion may be made to strike, at which time I will be in a position to rule.

Mr. Sargent: Just one more remark, Mr. Examiner, and I am saying this merely as an expression of our viewpoint, which carries out through your entire line of questioning. Until such time as it is shown to be competent, by reason of having been brought home, it is our position that the evidence itself is incompetent and immaterial, because it could have no bearing, except by being in the record, to have a prejudicial effect, until it has been connected up; and, therefore, I would like to have an objection to all the line of questions with regard

(Testimony of Seth R. Brown.)

to this, until such time as there has been a tie-up between the negotiations themselves and the book of the international laws.

Trial Examiner Moslow: You may have such an objection and exception to the entire line.

Did you offer Board's Exhibit 4?

Mr. Ryan: Yes, I did.

Trial Examiner Moslow: Board's Exhibit 4 will be [44] received.

(Thereupon the document heretofore marked for identification as Board's Exhibit No. 4, was received in evidence.)

BOARD'S EXHIBIT No. 4

GENERAL LAWS

Article I.—Apprentices.

Section 1. Apprentices shall not be less than 16 years of age at the time of beginning their apprenticeship. They shall be listed by the secretary of the local typographical union and they shall serve an apprenticeship period of six years before being admitted to journeymen membership in the union: Provided, That upon request of the local union and employer, and with the consent of the President of the International Typographical Union, a period of time not to exceed one year may be deducted from the six-year apprenticeship term: Provided, further, Failure of apprentice member on completion of his apprenticeship period to file his application for transfer to the journeyman roll shall be sufficient

(Testimony of Seth R. Brown.)

cause for cancellation of his apprenticeship.

Sec. 2. Mailer and machinist apprentices shall be exempt from the requirement that the Course of Lessons in Printing must be completed before transfer to journeymen membership. Provided, however, that at beginning of fifth year all such apprentices must subscribe for, and complete Unit Six of the Course of Lessons before admission as journeymen.

Sec. 3. All apprentices entering the trade shall be required during the first year to pass a physical and technical examination given by the apprentice committee of the subordinate union to which such application is made.

Sec. 4. No apprentice shall leave one office and enter that of another employer without the written consent of the president of the local union, and the date of such change of offices by the apprentice shall be recorded on the books of the union.

Sec. 5. All local unions are required to enact laws defining the grade and classes of work apprentices shall be taught from year to year, so that they will have the opportunity of acquiring a thorough knowledge of the trade. No office shall be entitled to employ an apprentice unless it has the equipment necessary to enable instruction being given the apprentice in the several classes of work agreed upon in the contract with the employer to be taught each year.

Sec. 6. All applicants for apprentice membership in the International Typographical Union shall

(Testimony of Seth R. Brown.)

be required to pass a technical examination given by the apprentice committee of the subordinate union to which such application is made.

Sec. 7. At the beginning of the second year, if apprentices prove competent, they must be admitted as apprentice members of the union.

Sec. 8. Every person admitted as an apprentice member of a local union at the beginning of the second year of apprenticeship shall subscribe to the following obligation:

I (give name) hereby solemnly and sincerely swear (or affirm) that I will not reveal any business or proceedings of any meeting of this or any subordinate union to which I may hereafter be attached, unless by order of the union, except to those whom I know to be members in good standing thereof; that I will, without equivocation or evasion, and to the best of my ability, abide by the constitution, by-laws and the adopted scale of prices of any union to which I may belong, as they apply to apprentice members; that I will at all times support the laws, regulations and decisions of the International Typographical Union, and will carefully avoid giving aid or succor to its enemies, and use all honorable means within my power to procure employment for members of the International Typographical Union in preference to others; that I will not wrong a member of this union or see him or her wronged, if in my power to prevent. To all of which I pledge my most sacred honor.

Sec. 9. Apprentice members shall not have the

(Testimony of Seth R. Brown.)

privilege of voting. From the time of registration until such apprentice members are transferred to the journeyman roll, they shall pay per capita tax and subscription to The Typographical Journal as provided in section 1, article ix, constitution. They shall be exempt from pension and mortuary assessments.

Sec. 10. Following initiation the apprentice member shall be registered with the Secretary-Treasurer of the International Typographical Union, who will assign to each junior member a registry number.

Sec. 11. Beginning with the second year, apprentices shall be enrolled in and complete the International Typographical Union Course of Lessons in Printing before being admitted as journeymen members of the union. This course of lessons shall include a course on trade unionism, containing complete information and instruction on the principles of unionism, and to be prepared by the Educational Bureau of the International Typographical Union.

Sec. 12. Starting with the second year apprentices are entitled to and must be in possession of an apprentice working card.

Sec. 13. Arrangements should be made to have apprentices during the sixth year instructed on any and all typesetting and typecasting devices in use in the offices where they are employed.

Sec. 14. Apprentices shall be required to complete the I. T. U. Course of Lessons in Printing before being admitted to journeyman membership, except with the consent of the President of the In-

(Testimony of Seth R. Brown.)

ternational Typographical Union. The President of the International Typographical Union shall have authority to cancel the card of any person admitted to membership in violation of any of the foregoing provisions and may impose a penalty not to exceed $25 on offending unions.

Sec. 15. Local unions shall provde for the appointment of a committee on apprentices. The duties of the committee on apprentices shall be to inquire into the educational qualifications of applicants for apprenticeship, examine each apprentice, to ascertain if he is meeting the necessary requrements called for in the several classes of work specified for each year of his apprenticeship, and if, after such examination, the committee finds the apprentice has not made satisfactory progress, it shall so report to the union for such action as it is deemed proper to take; to require the attendance of apprentices at continuation and other schools and report any delinquency to the union; to compel all apprentices in the last five years of their apprenticeship to complete the I. T. U. Course of Lessons in Printing.

Sec. 16. A local joint apprentice committee composed of equal representation of the employers and the union should be formed to make surveys and study, investigate and report upon apprentice conditions. They shall act to enforce the conditions of the agreement covering apprentices and shall have full power and authority any time during the term of apprenticeship to terminate the apprenticeship of an apprentice who does not show aptitude and

(Testimony of Seth R. Brown.)

proper qualifications for the work, or for any other reasons. This committee shall meet jointly at the call of the chairman of each committee at such time and place as may be determined by them.

Sec. 17. Local unions shall incorporate in their contracts with employers a section containing the necessary requirements to carry out the apprenticeship laws of the International Typographical Union.

Sec. 18. The foreman and chairman of the chapel shall see that apprentices are afforded every opportunity to learn the different trade processes by requiring them to work in all departments of the composing room. When apprentices show proficiency in one branch they must be advanced to other classes of work.

Sec. 19. Local unions shall arrange scales of wages for apprentices in the second, third, fourth, fifth and sixth years of their apprenticeship, such scales to be indicated as proportionate to journeymen's scale. Registered apprentices shall be given the same protection as journeymen and shall be governed by the same shop rules, working conditions and hours of labor.

Sec. 20. Local unions are required to fix the ratio of apprentices to the number of journeymen regularly employed in any and all offices, but it must be provided that at least two members of the typographical union, aside from the proprietor, shall be regularly employed in the composing room before an office is entitled to an apprentice.

Sec. 21. For each additional five journeymen

(Testimony of Seth R. Brown.)

regularly employed an additional apprentice may be permitted. Provided, When four apprentices are employed, an additional apprentice for each ten journeymen may be employed. Provided, further, Nothing in this section shall be construed as prohibiting any subordinate union from inserting in the contract a provision that the total number of apprentices of any office shall be less than four.

Sec. 22. No apprentice shall be employed on overtime work in an office unless the number of journeymen employed on the same shift equals the ratio prescribed in the local scale. At no time shall any apprentice have charge of a department or class of work.

Sec. 23. Subordinate unions may adopt regulations preventing apprentices from continuing in or seeking employment in the office where they completed their apprenticeship for a period not to exceed one year.

Article II.—Arbitration.

Sec. 2. It is imperatively ordered that the executive officers of the International Typographical Union shall not submit any of its laws to arbitration.

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Q. (By Mr. Ryan): Mr. Brown, I show you Board's Exhibit No. 4 in evidence, and ask you to

(Testimony of Seth R. Brown.)

read those sections relative to apprentices, and requirements of the union with respect to entering into contracts relative to that particular——

Trial Examiner Moslow: Are you asking him to read it aloud or to himself?

Mr. Ryan: To read it out loud.

Trial Examiner Moslow: I don't see the necessity of reading aloud. I will allow you to have the witness state what particular sections you have in mind.

Mr. Sargent: I am going to object to that question, unless he told the management at the time he had that in mind.

Trial Examiner Moslow: Mr. Sargent, you have a general objection to this entire line.

Q. (By Mr. Ryan): Will you point out the sections and pages in the bylaws of Board's Exhibit 4 with reference to apprentices?

A. These sections are under General Laws, Article I, of Apprentices, Section 13, Section 17, 18, 20, 21, and 22.

Q. Are those the sections which the union relies on as evidence that it could not accept the proposal of the company—— [45] A. Yes, sir.

Q. ——with respect to apprentices?

Mr. Sargent: I object to that as putting in the witness' mouth an answer which has not yet been given by him, that he ever objected on the ground that he couldn't do this under international laws.

Trial Examiner Moslow: I will overrule the objection. The answer may stand.

(Testimony of Seth R. Brown.)

Q. (By Mr. Ryan): In your discussion with Mr. Hoiles on March 20, 1940, did you make any statement to him as to what the union's position was with respect to his offer on apprentices?

A. I don't believe that came up at that particular time, Mr. Ryan. I think it was later. We discussed the wage question and the vacations with pay more extensively than any other subject.

Q. Did you come to any agreement on those two?

A. No, sir.

Q. Did you thereafter have another meeting with representatives of the company to continue negotiations? A. After March 27?

Q. The March 20 meeting is the one we are now talking about.

A. March 27, I believe, was the next meeting.

Q. Where did that meeting take place and who was present, Mr. Brown? [46]

A. In the office of the Santa Ana Register, the business office; present on behalf of the union: myself, and present, E. Y. Taylor of the Santa Ana Typographical Union, representing the union; and Mr. C. H. Hoiles and Earl J. Hanna, representing the Register.

Q. What were the subjects of discussion at that meeting?

A. They were practically the same discussions as prevailed at the March 20 meeting.

Q. You mean with respect to the company's proposal on apprentices?

(Testimony of Seth R. Brown.)

A. Yes, sir. That was brought up at the second meeting.

Q. What discussion was had at that meeting with respect to the company's proposal on apprentices?

A. Some reference was made to the counter-proposition submitted by the publishers, and in that was included a section that the office must be, must have complete control, over the apprentices, both as to the number to be employed, and as to the work they should perform from year to year, and we entered into a general discussion of that subject to some extent.

Q. What was said on behalf of the union's position by you with respect to that problem, if anything? What did you say in regard to that proposal?

A. Well, I stated that the union had certain regulations in reference to the number of apprentices to be employed and as to the work they should perform; and that an apprentice was [47] not permitted to work on a typesetting machine until the last year of his apprenticeship, and that seemed to be a matter of controversy.

Q. And when you say the union had certain regulations, what do you mean by that?

A. Well, they had a provision, an international law, it was also incorporated in the oral contract that was in existence at the time of this controversy.

Q. You have reference to the contract which had been in existence between the union and the Regis-

(Testimony of Seth R. Brown.)

ter Publishing Company, Ltd. prior to March 1, 1940. Is that right?

A. Yes, the one that expired, but they were still working under it.

Q. Was any agreement reached on any of the issues between the company and the union at this time, this March 27 meeting? A. No, sir.

Q. Were any changes made in the proposals by either the union or the company?

A. Not up to that time.

Q. Up to that time the union's proposal with reference to wages was a request for 15 cents an hour increase over the prevailing scale in the shop, of a dollar an hour. Is that right?

A. Yes, sir.

Q. Also, there was a provision with respect to vacations? [48]

A. One week's vacation with pay.

Q. Did you have any further meetings with the company after March 27, 1940?

A. The next meeting was on April 15, 1940.

Q. Where was that meeting, and who attended on behalf of each party?

A. It was held at the office of the Santa Ana Register. Present for the union was myself and George Duke; on behalf of the Register was Mr. C. H. Hoiles and Mr. Hanna.

Trial Examiner Moslow: Who is George Duke?

The Witness: He is sitting right there (indicating).

Mr. Duke: I am George Duke.

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: Who is George Duke? What office did he hold, Mr. Brown?

The Witness: He was, I think, vice president at that time, of the union.

Trial Examiner Moslow: Of the local?

The Witness: The local union, yes, sir.

Q. (By Mr. Ryan): All right. Have you told us who was present on behalf of the company?

A. Yes, sir; Mr. Hoiles and Mr. Hanna.

Q. What was the subject of discussion at that meeting?

A. We asked the representative of the publisher if they had any counter-proposition to make, and they said no. Then we, on behalf of the union, offered to submit a proposition to the [49] local union for consideration, to settle the scale on the basis of $1.06 an hour, and that offer was immediately turned down by the representatives of the Register.

Q. What did Mr. Hoiles say?

A. In effect there was no justification for an increase.

Q. Did he tell you what he would offer to pay, or did he make any offer on wages at all?

A. He made no offer whatsoever.

Q. Was anything other than wages discussed at that meeting?

A. I made an offer that we arbitrate the case.

Mr. Sargent: Who made the suggestion?

The Witness: I made the suggestion.

Q. (By Mr. Ryan): Did you make that sugges-

(Testimony of Seth R. Brown.)

tion to Mr. Hoiles and the other company representative, Mr. Hanna? A. Yes, sir.

Q. What did you propose to arbitrate?

A. The various sections that were at issue on the scale.

Q. The wage scale?

A. The wage was a part of it?

Q. Did the company raise any point, renewing its position with respect to apprentices, at this April 15 meeting?

Trial Examiner Moslow: Before you get to that point, what answer was made when you made the suggestion about arbitration?

The Witness: Mr. Hoiles stated that they would take the [50] position that they would refuse to submit the matter to a third party for arbitration.

Q. (By Mr. Ryan): Was any discussion had about apprentices at this April 15, 1940 meeting?

A. I don't recall that there was.

Q. Was any discussion had regarding anything else pertaining to the contract with the company?

A. Well, there was a discussion between another representative of the union and one of the publishers, but——

Q. Who representing the union and who representing the company?

A. Well, Mr. Duke for the union and Mr. Hoiles represented the register?

Q. Were you present? A. Yes, sir.

Q. You heard what was said, did you?

A. I did.

(Testimony of Seth R. Brown.)

Q. Tell us what was said by each party, Mr. Brown?

A. Mr. Duke stated that the Santa Ana Typographical Union would desire to enter into a contractual relation with the Santa Ana Register; in the event they reached an agreement they wanted the contract underwritten and signed by both parties. Mr. Hoiles stated that the Register was opposed to a signed, written contract.

Q. Did you request Mr. Hoiles to submit any counter- [51] proposals in this April 15 meeting with respect to wages or any other——

A. Previous to submitting our proposition for $1.06 we asked them if they had any proposition to submit, because we had requested at the last meeting, March 27, that the Register submit any proposition that they had, that they felt disposed to do, at the next meeting, and that the union would do likewise.

Q. But they did not submit any counter-proposal? A. No, sir.

Q. It was at the April 15 meeting?

A. No, sir, they did not.

Q. How did the meeting terminate?

A. We again requested the Publisher to submit a proposition to settle the controversy, and I believe we agreed on another meetng at that time.

Q. Were any terms of a contract agreed upon at the April 15 meeting? A. No, sir.

Q. Thereafter did you have another meeting with the management of the company?

(Testimony of Seth R. Brown.)

A. Yes, sir.

Q. When was it, and who was present?

A. I believe it was May 3, and the same parties were present: Mr. Duke and Mr. Brown for the union, and Mr. Hanna and [52] Mr. Hoiles for the Register.

Q. What were the suggestions discussed at that meeting of May 3, 1940?

A. The union representatves again asked the publisher if they had any proposition to submit and they said no. Thereupon, Mr. Duke on behalf of the union submitted another proposition to settle the controversy, based upon a graduated scale for a three-year period running from a dollar up to $1.08 an hour over a period of three years, with a step-up, I believe, of every six months. This proposition was taken under consideration by the representatives of the Register.

Trial Examiner Moslow: Will you read that back, please, Miss Reporter?

(The record was read.)

Q. (By Mr. Ryan): Mr. Brown, I ask you whether or not the proposition submitted by Mr. Duke was as follows: $1.03 per hour up until September 1, 1940; and from September 1, 1940 to March 1, 1941, $1.04 per hour. Is that right so far? A. That is right.

Q. $1.05 per hour from March 1, 1941 to September 1, 1941; $1.06 per hour from September 1, 1941 to March 1, 1942; $1.08 from March 1, 1942 to March, 1943; is that right?

(Testimony of Seth R. Brown.)

A. That is right.

Trial Examiner Moslow: Just a second, please. Read that last there. [53]

(The record was read.)

Mr. Ryan: Will counsel for the respondent stipulate that is the counter-proposal that was offered to the company as of that date?

Mr. Sargent: I am informed, Mr. Ryan, that there were one or two other provisions in the proposal.

Mr. Ryan: Yes, I am going into that; but, with respect to wages.

Mr. Sargent: Let us get the whole thing before us——

Trial Examiner Moslow: What is the necessity of getting a stipulation on these minor points? I assume if the company doesn't dispute it that was the offer that was made.

Q. (By Mr. Ryan): Did the union offer a proposal on any other base?

A. Well, yes. A proposal for a vacation with pay.

Q. Do you recall what that proposal was?

A. Well, it was a step-up from two days a week to start with, up to the last year it would be five days.

Q. I ask you whether or not the proposal was two days vacation with pay in 1940; three days with pay in 1941; five days with pay in 1942; five days with pay in 1943. A. That is right.

Q. Did Mr. Hoiles agree or disagree with the

(Testimony of Seth R. Brown.)

offer? What did he say with reference to the offer on wages and vacation? [54]

A. He would take it under consideration.

Q. Was that the way the meeting terminated? That he would take these proposals you have just outlined under consideration?

A. Well, we asked him if he would consider the matter, and he said he would, and give us his answer.

Q. Was any arrangement made for a further meeting between the union and the company?

A. Yes, we had another meeting. I don't know whether it was arranged that particular day or not, but we had another meeting some two weeks later.

Q. I ask you if it was on or about May 16, 1940.

A. Yes, sir. I believe about that time.

Q. Who were the parties present at that meeting, and where was the meeting held?

A. Mr. Duke, Mr. Brown on behalf of the union; and Mr. Hoiles and Mr. Hanna on behalf of the publishers, and it was held in the office of the Santa Ana Register.

Mr. Sargent: Just a minute. Did I understand the witness to say he was there too?

The Witness: Yes, sir.

Q. (By Mr. Ryan): Will you tell us what was said by the various representatives at that meeting?

A. Well, I believe we were to have a meeting of the local union that evening, and after we met, and Mr. Hoiles had [55] definitely rejected the offer made by the union representatives, we expressed our

(Testimony of Seth R. Brown.)

regrets, because we called attention to the fact that the union was going to meet that evening, and that we were in hopes that the committee could recommend something that would meet with the approval of the organization.

You understand we didn't have carte blanche to close up a proposed wage scale. All we could do was to recommend to the union, and this was a proposition that we submitted to the publisher, that the union committee was willing to submit for approval to the local union.

Q. You say Mr. Hoiles rejected the proposal of the union on wages and vacation that you have just outlined? A. Yes, sir.

Q. Which was given to them, I believe, at the meeting of May 3, 1940. What did he say in respect to wages and vacation?

A. He stated he didn't see any justification for an increase of that kind, and they wanted to know where the money was coming from. I stated of course that we couldn't—very often we have that very question asked by publishers, when we are negotiating scales, and we are in no position to even recommend what a publisher should do to take care of his own business. If he wants to raise his newspaper rates, he does so without any solicitation on behalf of the union. We haven't anything to do with it and, therefore, the answer is always [56] the same when that question is asked; and in this particular case we informed Mr. Hoiles, of course we couldn't in-

(Testimony of Seth R. Brown.)

struct him how to run his business institution, for which he would be the first one to object.

Q. Did he submit any counter-proposals of his own with respect to these matters pertaining to wages and to vacations, when he rejected your proposal?

A. Not up to that time, or including that meeting.

Q. Did you ask him for proposals?

A. We did on various occasions.

Q. At that meeting did you?

A. Yes, sir.

Q. What was his reply?

A. He didn't have anything to offer.

Q. Did you hold any further meetings with representatives of the company after this meeting of May 16, 1940?

A. No, not for several months.

Q. How did it come about that you did not hold any meetings with the company again for a period of several months?

A. The union decided after considering the whole situation, that they would hold the matter in abeyance, pending developments.

Q. What do you mean by the whole situation?

A. The fact we couldn't arrive at any agreement. We had had several meetings with the publisher, and we couldn't [57] reach an agreement, and desiring to continue cordial relations and contractual relations, we believed it would be better to hold the matter in abeyance pending certain developments.

Q. Did you subsequent to May 16, 1940 eventually

(Testimony of Seth R. Brown.)

hold another meeting with the management of the company?

A. Yes, sir. The local typographical union, Santa Ana Typographical Union, adopted a new job scale in Orange County.

Q. You mean a new commercial job scale?

A. That is right, a new commercial job scale.

Q. When? In 1941?

A. March, 1941; and I think about the same time the local union also adopted a new newspaper scale incorporating the same provisions, so far as wages were concerned, as those that were incorporated in the commercial scale and signed by the union commercial men in Orange County.

Q. Did you, about March, 1941, enter into contracts in Santa Ana with the commercial job printers for a new scale of wages?

A. Santa Ana Typographical Union entered into contracts with proprietors of commercial houses, union proprietors of commercial houses.

Trial Examiner Moslow: In Santa Ana?

The Witness: In Santa Ana, and Orange County.

[58]

Trial Examiner Moslow: Is Santa Ana in Orange County?

The Witness: Yes, sir. I think we had offices in Laguna Beach, too, that came under the division.

Q. (By Mr. Ryan): What was the new wage scale?

A. It was $1.07 from March, I think, or April, up to October.

(Testimony of Seth R. Brown.)

Q. I ask you if it was $1.07 per hour from April 1, 1941 to October 1, 1941; and $1.12 per hour from October 1, 1941 to October 1, 1942.

A. Yes, those were the provisions of the scale.

Q. With how many commercial job shops in Santa Ana did you arrive at contracts for that scale?

A. I don't know the total number of it, but all union shops. The members of the local union could give you more information on that, but all the union shops signed the contract.

Q. Previous to signing the contract in March, 1941, with the commercial job shops, what had the wage scale been in those shops per hour?

A. $1.00 an hour.

Mr. Sargent: I object to that as not being applicable to the newspaper scale in any wise whatsoever.

Trial Examiner Moslow: Objection overruled.

Q. (By Mr. Ryan): At the time that this commercial job scale was adopted, I believe you testified that an identical newspaper scale was adopted, also, by the union.

A. As to wages, at least. [59]

Q. As to wages? A. Yes.

Q. Did you about that time in March, some time around in March, contact the representatives of the Register Publishing Company with the intention of resuming negotiations covering wages and working conditions, Mr. Brown?

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: On the record. Read the question.

(The question was read.)

The Witness: Yes, sir.

Trial Examiner Moslow: What year is that? 1941?

The Witness: 1941.

Q. (By Mr. Ryan): How was the company contacted by the union with respect to requesting the company to enter into negotiations with the union, in 1941, March?

A. A letter was sent by the Santa Ana Typographical Union to the Register, requesting a meeting to negotiate a contract.

Q. Did you receive a reply to your letter?

A. I don't know whether there was a written reply or not, but a meeting was held——

Q. Was a meeting between the company and the union arranged as a result of your request?

A. Yes, sir. [60]

Q. When did that meeting take place between the company representatives and the union representatives?

A. I couldn't give the exact date. It was some time in March.

Q. I ask you, Mr. Brown, if it wasn't on or about April 18, 1941. A. April 18?

Q. Yes.

A. A meeting was held at that time, but I think there was a meeting held previous to that. I am not quite sure, though.

(Testimony of Seth R. Brown.)

Q. Would it be in the early part of April?

A. It would be in the early part of April or the last part of March, if held.

Q. Did you attend the meeting?

A. Yes sir, I attended all the meetings, with the exception of the first, in 1940.

Q. We are talking about 1941 now, Mr. Brown.

A. Yes, sir, I understand.

Q. Did you attend the first meeting in 1941?

A. Yes, sir.

Q. Between the company and the union?

A. Yes, sir.

Q. You think it was either the last of March or the first part of April that the meeting was held? Is that right?

A. I think the synopsis you have would give the exact dates. [61]

Q. April 18, 1941 is the record I have, that the first meeting was held.

A. Then that's probably correct.

Q. Who attended the first meeting on behalf of the union and the company?

A. I was present; Mr. Duke, and I think Mr. J. H. Patison represented the union, and Mr. C. H. Hoiles and Mr. Juillard, representing the register.

Q. The first name is Ralph, I believe? Is that right? What is his position with the company, do you know?

A. I understand he was advertising manager.

Mr. Ryan: What is his position with the company, Mr. Sargent?

(Testimony of Seth R. Brown.)

Mr. Sargent: Was and is advertising manager, that time and now.

Trial Examiner Moslow: Is that stipulated, Mr. Ryan?

Mr. Ryan: So stipulated.

Q. (By Mr. Ryan): What were the matters discussed at this meeting that you have just mentioned?

A. Well, a request to incorporate the same provisions in the wage contract that has been agreed to by the commercial printers in Orange County.

Q. Did you make that request to Mr. Hoiles and Mr. Juillard? A. Yes, sir, we did.

Q. What was the reply of Mr. Hoiles, if any?

[62]

A. Well, we took the position that it was the prevailing wage in Orange County, and he didn't seem to think very much of that.

Q. What did he say, Mr. Brown? Tell us what he said as best you can.

A. Well, he said they employed a greater number of printers who had membership in the Santa Ana Typographical Union, and he didn't think that the job scale should be comparable to his plant, and that while it wouldn't embarrass the Register to increase the wages, that if he did so——

Q. It wouldn't embarrass them how?

A. Well, financially.

Q. Did he say that?

A. Yes, sir. However, if he granted the printers an increase that other employees in other departments would want like treatment.

(Testimony of Seth R. Brown.)

Mr. Sargent: Read that, please.

(The answer was read.)

Q. (By Mr. Ryan): Is that what he said to you, Mr. Brown?

A. That's what he said to both of us, the committee.

Q. Mr. Hoiles said that to the committee?

A. Yes, sir.

Q. Were any other matters discussed at this meeting other than the wage question?

A. Well, we discussed the apprenticeship question again, [63] in reference to boys working on the machines.

Q. Who raised that issue for discussion at that meeting?

A. I think it was brought up by Mr. Patison, originally, one of our committee, who, I believe at that time was chairman of the office, chairman of the composing room.

Q. What was said in regard to that issue?

A. He stated that the office thought the boys should be privileged to go on the machine previous to the last year of their apprenticeship.

Q. Who stated that, Mr. Brown?

A. Mr. Hoiles, and in reply to that I stated that the laws of the International and the customs for years had been that the boys were not permitted to work on typesetting machines except during the last year of their apprenticeship.

Q. What did Mr. Hoiles say in response to your statement?

(Testimony of Seth R. Brown.)

A. He didn't follow it up to any extent, except that he disagreed with it.

Q. With respect to the proposal on apprentices made by the company back in 1940, March, 1940, when you stated that they made the proposal, that the company demanded full control over apprentices, did they say anything to you to indicate that they were still maintaining that position with respect to the proposals?

Mr. Sargent: I object to that question on the ground that it is my recollection that Mr. Brown did not testify [64] that the company was demanding full control over apprentices.

Trial Examiner Moslow: Objection overruled.

The Witness: May I have the question read?

Trial Examiner Moslow: Read the question.

(The question was read.)

The Witness: Well, this general discussion we had there would indicate that they were in the same frame of mind. I think it was a little later where the specific proposition was put up, a written notice.

Q. (By Mr. Ryan): Did Mr. Hoiles say anything at this meeting——

Mr. Sargent: Your Honor, I ask that that may go out and the witness be instructed to tell what was said, instead of characterizing the conclusions.

Trial Examiner Moslow: I grant the motion to strike the answer. Read that question again.

(The record was read.)

Trial Examiner Moslow: In other words, Mr.

(Testimony of Seth R. Brown.)

Brown, tell us what Mr. Hoiles said instead of characterizing it.

The Witness: He stated that he believed that an apprentice should be allowed to work on a machine before his sixth year.

Q. (By Mr. Ryan): Then did he say anything else, Mr. Brown?

A. Well, I don't recall that he did; there was a general discussion there. [65]

Q. Did you ask Mr. Hoiles to make any counter-proposals to the union, at this meeting of April 18, 1941? A. Yes, sir.

Q. Tell us what you asked.

A. We simply asked if he had any—we would be glad to receive a proposition, if they were not satisfied with the one put forth by the Santa Ana Typographical Union; that if he had a proposition to settle the scale, that the union committee would give it thorough consideration.

Q. Did Mr. Hoiles reply to you or make any counter-proposal?

A. He didn't make any proposal.

Q. Did he make any comment on your request for a proposal? A. Not that I recall.

Q. How did the meeting terminate? What were the circumstnaces that caused the meeting to terminate? Had you achieved any agreement on any issue?

A. No, sir, we had not reached an agreement on any issue. That's the April 18?

Q. Yes.

(Testimony of Seth R. Brown.)

A. There was one meeting there. Whether that was the April 18 or not, where Mr. Hoiles had submitted a proposition to have the union increase their hours from 37½ to 40 hours, at the same rate per hour. Whether that was at the April meeting I am not quite clear, but it was in one of the two meetings. [66]

Q. To refresh your recollection, I will ask you if Mr. Hoiles didn't propose to the union that the wage scale remain the same, that is, $1.00 an hour, but that the union permit the union members to work 40 hours a week instead of 37½?

A. Yes, that's what happened. That is as I expressed it, in other words there.

Q. Did the union accept that proposal?

Mr. Sargent: You might get the date, just to locate it, Mr. Ryan.

Mr. Ryan: April 18, 1941.

Trial Examiner Moslow: Did you say this took place around April 18?

The Witness: Yes, sir.

Q. (By Mr. Ryan): Did the union representatives reject or accept this proposal?

A. The union representatives informed the publishers that we were opposed to the proposition, but that we would take it back to the Santa Ana Typographical Union for their jurisdiction.

Q. To the rank and file members?

A. To the rank and file members, and we did take it back, and they rejected it.

Q. What was your next step? Did you continue

(Testimony of Seth R. Brown.)

attempting to negotiate with the Register Publishing Company after that? [67] By "you," I mean yourself as a representative of the union.

A. Yes, we had another meeting April 26, I think.

Q. It was on or about April 26, 1941?

A. Yes, sir.

Q. Who was present at that meeting?

A. The same parties: Mr. Duke and Mr. Patison and myself, as representatives of the union; and Mr. Hoiles and Mr. Julliard on behalf of the Register.

Q. What took place at that meeting? What was said by the various parties and what were the issues discussed?

A. Well, the same issues were discussed. We informed the representatives of the publishers that the union had turned down the proposition to increase the hours at the same rate of pay, and stated that the union was in favor and desired to have an increase in the hourly wage, and we discussed that matter for the rest of the meeting, without reaching any conclusion.

Q. That one point of wages?

A. Yes, sir.

Q. Did the union make any proposal on wages at that meeting other than to say that you requested an increase in wages per hour?

A. We still maintained the wages adopted at the March meeting, and those were: $1.07 an hour for six months and up to $1.12 an hour. [68]

(Testimony of Seth R. Brown.)

Q. The one that had been adopted by the commercial houses here?

A. The same one, the same rates, at least.

Q. Did you ask for any counter-proposals from the union again at this meeting with respect to any other issues?

Trial Examiner Moslow: You say from the union?

Q. (By Mr. Ryan): From the company.

A. We asked them to submit any proposition, and we would take it under consideration.

Q. Did they? Did the representatives of the company, Mr. Hoiles, or the other man that was present, Mr. Juillard?

A. Not at that time.

Q. Did they make any proposal to you at that meeting? A. No, sir.

Q. Did you request the company to arrange for another meeting with the union for a later date?

A. Yes, sir.

Q. At the close of this meeting on April 18?

A. Yes, sir.

Q. What was said in that regard?

A. Well, Mr. Hoiles stated that we could have a meeting all right, but he didn't think we were going to do any good. We could talk about the weather or the war, or some other subject, but so far as he was concerned, there wouldn't be any increase in wages except as to lengthening of the hours. [69]

(Testimony of Seth R. Brown.)

Q. Did you at the close of that meeting definitely arrange to meet at a subsequent date?

A. No, sir. I think that another date was arranged, by the request of Mr. Duke.

Q. Mr. Duke being president of the union at that time? A. Yes, sir.

Q. Do you know whether Mr. Duke did arrange a meeting?

A. We were to hold a meeting on a Saturday. I think that was April—that was four days—about the 27th, I believe.

Mr. Sargent: Saturday would have been the 26th.

The Witness: That's when it was, Saturday was the 26th, was the day that we were to meet, and we were congregated out in the composing room waiting for the meeting, when Mr. C. H. Coiles came out and stated—do you want me to continue?

Q. (By Mr. Ryan): Tell what he stated.

A. He stated that the Register Publishing Company was going over the entire situation and they anticipated that they would have a proposition ready for this joint meeting on Saturday, but had been unable to complete their findings, and he therefore stated that the office would send me a registered letter on Monday, giving the position of the Register Publishing Company upon the wage question and contract.

Q. That would be Monday, April 28?

A. Yes, sir.

Q. Now, when you say "we were congregated

(Testimony of Seth R. Brown.)

out in the compos- [70] ing room," who do you mean?

A. The union committee; Mr. Duke——

Q. Who constituted the committee on that occasion?

A. Mr. Duke, Mr. Patison, and myself.

Q. When you say "Mr. Hoiles," do you have reference to the same gentleman, C. A. Hoiles, who has been present at the meetings you have been talking about? A. Yes, sir.

Q. After you had been advised by Mr. C. H. Hoiles that the company would submit some counter-proposals to the union on Monday, April 28, did you leave the office of the company?

A. Yes, sir.

Q. Did you return to meet—strike that.

Did you, on April 28, 1941, receive any counter-proposals from the company?

A. I believe it was on the next day, Tuesday; on Monday Mr. Hoiles' secretary called me up and stated that they had been unable to get the proposition registered to me on Saturday, so it wouldn't reach me until Tuesday morning.

Q. Did you, on Tuesday morning, April 29, receive some written counter-proposals from the company? A. Yes, sir.

Mr. Ryan: Mr. Examiner, may I have a five-minute recess, please?

Trial Examiner Moslow: We will recess for five minutes. [71]

(A short recess was taken.)

(Testimony of Seth R. Brown.)

Trial Examiner Moslow The hearing will come to order.

Mr. Brown, I think you testified there was a meeting on April 26th, in which you informed Mr. Hoiles that you rejected his proposition of an increase in hours with the same rate of pay?

The Witness: That must have been the 18th. We did not hold a meeting on April 26.

Q. (By Mr. Ryan): What did happen on the 26th, Mr. Brown?

A. I came here to have a conversation with the representatives of the publisher of the Register, and we were informed that a registered letter would be sent to my home address on Monday.

Trial Examiner Moslow: Before you get to that point, you also quoted a remark that you attributed to Mr. Hoiles about discussing the war or the weather. Was that also at the meeting of April 18?

The Witness: Yes, sir, when we adjourned; after we had adjourned.

Trial Examiner Moslow: Very well.

Q. (By Mr. Ryan) In your previous testimony there was some doubt as to whether or not a meeting had occurred in 1941, prior to April 18. I now ask you if it refreshes your mind that there was a meeting held between the representatives of the company and the union on April 2, 1941. [72]

A. I knew there was another meeting there, but I couldn't fix the exact date.

Q. Who were present at that meeting?

A. Mr. Duke——

(Testimony of Seth R. Brown.)

Mr. Sargent: This is April 3?

Mr. Ryan: 1941.

Mr. Sargent: April 3.

The Witness: Yes. Mr. Duke, Mr. Patison, and myself representing the union; and Mr. Hoiles and Mr. Juillard representing the publishers.

Q. (By Mr. Ryan): Did you discuss the wage scale submitted by the union as its proposal?

A. Yes, we discussed the new scale that had been adopted, and submitted to the publishers for consideration.

Q. That is, of course, the scale that you have already testified as adopted in the job printing houses here? A. Yes, sir.

Q. Here in Santa Ana. Was any agreement reached on wages at the April 3, 1941 meeting?

A. No agreement was arrived at.

Q. Did the union request the company representatives to make any counter-proposals at that meeting?

A. We asked them to submit any proposition that they desired on the wage question, and that we would give it, as a committee, consideration. [73]

Q. Did Mr. Hoiles or Mr. Juillard make any reply to your request that they submit counter-proposals at this April 3 meeting?

A. Oh, there was no proposition submitted.

Q. Did they make any reply? Did they make any reply, Mr. Brown, to your request that they submit counter-proposals? Did they say anything?

A. Nothing definite, no.

(Testimony of Seth R. Brown.)

Q. Did they say anything at all in that regard, as to whether or not they would submit counter-proposals?

A. Mr. Duke asked Mr. Hoiles if he would state, as he did the year previously, that he wouldn't consider any increase in wages, and Mr. Hoiles said no, he wouldn't take that position; and from that remark the union representatives were hopeful that some sort of a settlement might be worked out.

Mr. Sargent: That is a conclusion, not binding upon the respondent. If he made the remark, during the negotiations, I prefer that go into the record rather than the hopes of what the union has expressed on that.

Trial Examiner Moslow: I will let the record remain.

Q. (By Mr. Ryan): Did the representatives of the company and the union arrive at any agreement with respect to wages, hours, or working conditions, at the April 3 meeting? A. No, sir.

Q. At the conclusion of the meeting on that date was there [74] any arrangement between the company and the union representatives for the holding of a subsequent meeting?

A. You mean as to the April 3 meeting?

Q. Yes.

A. I don't know whether it was arranged when we adjourned or not, but a meeting was held in April——

Q. You did hold an April 18, 1941 meeting?

A. Yes.

(Testimony of Seth R. Brown.)

Q. I believe you have already testified what took place at the April 18 meeting? A. Yes, sir.

Q. You have already testified, Mr. Brown, that you received a written proposal from the company on or about April 29, 1941. Is that right?

A. Yes, sir.

Mr. Ryan: Mark this as Board's Exhibit next in order.

(Thereupon the document referred to was marked as Board's Exhibit No. 5 for identification.)

Q. (By Mr. Ryan): Mr. Brown, I show you Board's Exhibit 5 for identification, and ask you to identify it for yourself.

A. Yes, that is the communication I received by registered mail.

Q. From whom?

A. From Mr. C. H. Hoiles.

Q. It is a letter under the letterhead of Santa Ana Register, [75] addressed to Seth R. Brown, Special Representative of the International Typographical Union, 428 North Poinsettia Place, Los Angeles, California, appearing to bear the signature of one C. H. Hoiles. Is that right?

A. Yes, sir. [76]

Mr. Ryan: I offer Board's Exhibit 5 for identification in evidence.

Trial Examiner Moslow: Any objection?

Mr. Sargent: Just a minute.

No objection.

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: Board's Exhibit 5 may be received.

(Thereupon the document heretofore marked as Board's Exhibit 5 for identification, was received in evidence.)

BOARD'S EXHIBIT No. 5

Register Publishing Co., Ltd.
Publishers of
Santa Ana Register

California's Most Consistent Newspaper
Santa Ana, California

April 26, 1941.

Seth R. Brown, Special Representative
International Typographical Union
428 N. Poinsettia Place
Los Angeles, California

Dear Mr. Brown:

In accordance with our recent negotiations, the Board of Directors of the Register Publishing Co., Ltd., have authorized me to place this proposition before you in writing.

Namely, we are willing to allow our printers to work forty (40) hours a week, instead of 37½, at the same rate they are now getting of $1 an hour. This will give them a weekly increase of $2.50, or approximately $130 a year.

Also, we are to have complete control of the num-

(Testimony of Seth R. Brown.)

ber and work of our apprentices, as we see fit for efficient operation of our plant.

Hoping this meets with your approval, we are,

Very truly yours,

REGISTER PUBLISHING CO., LTD.,

C. H. HOILES,

CHH:BG Secretary-Treasurer.

[Endorsed]: Filed 5/7/42.

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Mr. Sargent: That date is the 26th, is it not?

Mr. Ryan: Yes, 1941.

Q. (By Mr. Ryan): After receiving Board's Exhibit 5, in evidence, what did you do with it? Did you take the document up with the union members?

A. No, sir, not at that time, because they had already rejected the provisions of it.

Q. Are the proposals set forth in the written document, which is Board's Exhibit 5, a repetition of the counter-proposals which had previously been given to the union by the company? Is that your contention?

A. Mr. C. H. Hoiles proposed at our meeting, one of our conference meetings, that the union work 40 hours instead of 37½, and thereby they would earn $2.50 more a week at the same rate of pay, of $1.00 an hour, but it was not coupled at that time with this apprenticeship proposition, with com-

(Testimony of Seth R. Brown.)

plete control of apprentices; that was in a section [77] by itself, and submitted as such by the committee.

Q. But evidence of these proposals had previously been submitted to the union and rejected by the union. Is that right? A. Yes, sir.

Q. After receiving the company's letter of April 26, 1941, which is Board's Exhibit 5 in evidence, did the union make any further effort to meet with the company——

A. I made an effort.

Q. ——with respect to bargaining?

A. In fact, I did have a meeting with Mr. C. H. Hoiles on the afternoon of April 30th, just a few hours previous to the strike, and I stated at that time to Mr. Hoiles that I had been requested by the president, Mr. Baker, of the International Typographical Union, to come in and endeavor to find some common ground to settle the controversy without a strike.

And I urged Mr. Hoiles to take back the proposition, eliminate the proposition in reference to the apprentices, and to confer further upon the wage question, and if he would do that I thought there was an opportunity to settle the controversy.

Q. You have reference to Mr. C. H. Hoiles?

A. Yes, sir.

Q. When did you meet with him? [78]

A. On April 30, in the afternoon, Wednesday, April 30, I think it was.

Q. In requesting that the company retract its

(Testimony of Seth R. Brown.)

proposal with respect to apprentices, as set forth in their letter of April 26th, what did Mr. Hoiles say, if anything?

A. Well, Mr. Hoiles refused to do so, and stated that the written communication expressed the position of the Santa Ana Publishing Company, and would not be deviated from.

Q. Did you make any further statements with respect to that position in the letter of April 26, 1941, to Mr. Hoiles?

A. I made the statement that the local union couldn't adopt a position of that kind, on account of the mandatory provisions that should be included in the contract, and that he was asking for something that the union could not grant, even if it desired to do it, which it did not.

Q. Why couldn't the union grant it?

A. Because that violated the laws of the International Typographical Union, and the very agreement itself, that had been in effect here, the oral agreement.

Mr. Ryan: Mark this as Board's Exhibit 6 for identification, please.

(Thereupon the document referred to was marked as Board's Exhibit No. 6, for identification.)

Q. (By Mr. Ryan) Mr. Brown, I show you a document marked for identification as Board's Exhibit 6, which is entitled [79] "Book of Laws of the International Typographical Union, in effect Jan-

(Testimony of Seth R. Brown.)

uary 1, 1941." I ask you whether or not this is the by-laws and constitution of the International Union, in effect in 1941? A. Yes, sir.

Q. At the time that you received the letter from the company, dated April 26th, which is in evidence, as Board's Exhibit 5, were these by-laws in effect? A. Yes, sir.

Q. Is there anything in the by-laws, which are Board's Exhibit 6 for identification, which would prohibit the union from agreeing to the proposal in regard to apprentices, that is incorporated in the letter of the company of April 26, 1941?

A. Well, there are several provisions in here. There is Section 17: "Local unions shall incorporate in their contracts with employees a section containing the necessary requirements to carry out the apprenticeship laws of the International Typographical Union."

Mr. Ryan: I offer Board's Exhibit 6 for identification——

Mr. Sargent: Before you do it, may I see it, please?

Mr. Ryan: I am sorry.

Trial Examiner Moslow: Mr. Brown, is there any difference in the by-laws relating to apprentices between 1940 and 1941? [80]

The Witness: I think not.

Trial Examiner Moslow: I would prefer you would compare it. If they are the same I would rather not receive the 1941 volume. I will give you a brief recess for that purpose.

(Testimony of Seth R. Brown.)

Mr. Ryan: All right.

(A short recess was taken.)

Trial Examiner Moslow: The hearing will come to order.

Mr. Ryan: We detected one change in the number of apprentices. Is that right, Mr. Brown?

The Witness: I don't think there is any difference in 1940 and 1941, Mr. Ryan. We both checked them.

Mr. Sargent: I don't think there is anything different there.

Trial Examiner Moslow: The rules for apprentices in the by-laws for 1941 are the same as for 1940?

The Witness: Yes, sir.

Trial Examiner Moslow: I will reject the Board's offer.

Mr. Ryan: I withdraw the offer.

Mr. Sargent: Your ruling, Mr. Examiner, was to prevent cluttering up the record?

Trial Examiner Moslow: That is right.

Q. (By Mr. Ryan) Did you point out to Mr. Hoiles in this discussion you had with him with reference to the company's proposal, of April 26th, which is Board's Exhibit 5, that you could not agree to the proposal because of your by-laws [81] and constitution?

Mr. Sargent: I object to that as leading.

Trial Examiner Moslow: I will sustain the objection.

What did you tell Mr. Hoiles when you met him that afternoon?

(Testimony of Seth R. Brown.)

The Witness: I told him I had been requested by the president, Mr. Baker, of the International Typographical Union, to call on him and make an earnest effort to avoid any trouble in the Register's composing room; that the local union was to meet that evening, and I suggested Mr. Hoiles withdraw the proposition in reference to the apprentices, which they could not accept even if they wanted to, and to confer further upon the wage question, and he refused to do so.

Q. (By Mr. Ryan) Was there anything else said at that meeting? A. No, I think not.

Q. What did you do then, if anything?

A. We had a meeting of the local union that evening, and I made a full report——

Mr. Sargent: Just a minute. I object to what took place at the local meeting unless it was brought home to the management.

Trial Examiner Moslow: Objection overruled.

The Witness: I made a full report——

Mr. Sargent: Do I understand your ruling to be, Mr. [82] Examiner, that he may testify as to whatever took place at the union meeting?

Trial Examiner Moslow: One of the allegations of the complaint was that the strike was caused by unfair labor practices. It certainly to my mind would seem relevant to show the causes of the strike, according to the union's and Board's contention, regardless of whether or not the respondent was present at the meeting.

He is about to tell us, apparently, as to why they

(Testimony of Seth R. Brown.)

went on strike. That is relevant, whether the respondent was there or not.

The Witness: We had a meeting of the local union that evening and I made a full report on my actions, in endeavoring to settle the controversy, and the union had previously asked the International Typographical Union for the privilege of taking a strike vote, provided they could not settle the controversy.

Q. (By Mr. Ryan) What controversy?

A. The controversy between the local union and the Register. The executive council of the International Typographical Union had given the local union the right to take a strike vote, and placed the matter in my hands, with power to act; and after full discussion there that evening as to what had transpired, and that the union had full knowledge that they couldn't accept the terms laid down, even if they so desired, [83] we proceeded to take a strike vote.

Q. The terms laid down by whom?

A. By the Register Publishing Company.

Q. Do you have reference to the terms as incorporated in Board's Exhibit 5?

A. The last communication there of April 26th.

Q. Do you have reference, also, to the terms laid down by the company in its proposals as far back as the beginning of the negotiations, in March, 1940?

A. That would be affected by any counter-proposition that had among its provisions any suggestions

(Testimony of Seth R. Brown.)

that were contrary to the mandatory laws of the International Typographical Union.

Q. From the inception of the bargaining back in 1940? Is that it?

A. Yes, sir. However, that was a specific provision, that caused the difficulty, which was the apprentices.

Mr. Sargent: In view of his last remark, I move his answer be stricken, as to what went back to 1940, because he testifies now it was concerning the apprenticeship clause.

Trial Examiner Moslow: I didn't so understand his testimony. I deny your motion.

Q. (By Mr. Ryan) Did the union hold a vote at that meeting to strike? A. Yes, sir.

Q. Was the vote carried in favor of continuing the strike? [84]

A. Yes. We must have a three-quarter majority, a three-quarter vote, and there was more than that number recorded.

Q. The requirement that the union must have a three-quarter majority to strike, before a strike, is a proper requirement of your by-laws?

A. Yes, sir.

Q. I show you, Mr. Brown, Board's Exhibit 4 in evidence, and direct your attention to page 73, to Section 2 of Article 19, and ask you whether or not that is the section you have reference to when you say that the union members vote by a three-quarter majority before they can conduct a strike?

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: What is the relevancy of this, Mr. Ryan?

The Witness: Yes, sir.

Trial Examiner Moslow: Just one second. Don't answer.

Mr. Ryan: My purpose is to show that the union did authorize a strike; that it was a strike carried out in accordance with the by-laws of the union, and it was——

Trial Examiner Moslow: Let the answer remain.

Q. (By Mr. Ryan) After obtaining this vote to strike, did the union contact the management of the company to advise them that a strike vote had been taken?

A. Mr. Duke, the then president, or vice-president—I guess he was president at that time—contacted Mr. Hoiles [85] on the evening after the strike was ordered.

Q. Mr. C. H. Hoiles? A. Yes, sir.

Q. That was the same evening that the vote was taken, only shortly after the meeting adjourned. Is that right? A. Yes, sir.

Q. Did the union send Mr. Duke to the management to advise the management that a strike vote had been taken?

A. That action was taken just previous to adjournment by the union.

Q. You sent Mr. Duke to—— A. Yes, sir.

Q. What were the instructions given to Mr. Duke, if you know, at this meeting?

A. Well the instructions were that he should

(Testimony of Seth R. Brown.)

call on Mr. Hoiles and acquaint him with what had transpired, and request a compliance with the scale of the union.

Q. What was the next step taken by the union in this matter? Did you proceed to call your strike?

A. They proceeded to call all the union employees out of the composing room.

Q. When did the strike actually begin?

A. Around 11:00 o'clock at night, April 30th.

Q. 1941? A. Yes, sir. [86]

Trial Examiner Moslow: The strike vote was taken April 29th?

The Witness: 30th.

Q. (By Mr. Ryan) Has the union maintained a picket line in front of the plant of the Santa Ana Register Publishing Company? A. Yes, sir.

Q. Continuously since the inception of the strike? A. Yes, sir.

Q. Did you, after the strike, again continue your efforts to negotiate with the Register Publishing Company, Ltd., with respect to wages, hours, and other working conditions?

Mr. Sargent: I object to the question in the form in which it is asked.

Trial Examiner Moslow: I will sustain the objection.

Q. (By Mr. Ryan) Did you make any effort to negotiate with the company with respect to wages, hours, and working conditions, after the strike began?

(Testimony of Seth R. Brown.)

Mr. Sargent: Same objection.

Trial Examiner Moslow: I will sustain the objection.

Did you meet with the company again after the strike began?

The Witness: No, sir.

Q. (By Mr. Ryan) Did you have any conversation with any representative of the company since the strike began? [87]

A. Yes. I had a conversation over the telephone with Mr. C. H. Hoiles.

Q. And when was that conversation and what was it about?

A. It was the same time in May, 1941, and it was in reference to the suggestion by the Conciliation Division of the Department of Labor, that both sides submit the controversy to arbitration.

The local union of the Santa Ana Typographical Union agreed unanimously to arbitrate, and the Conciliator for the Department of Labor was requesting Mr. Hoiles to do likewise.

Not having anything definite as to the position of the Register upon the request, after a period of ten days I called Mr. Hoiles on the phone and asked him what the Register was going to do with reference to arbitration. He stated that they hadn't decided what to do, that it stood under consideration. I says, "You have had the matter now for ten days, possibly two weeks, and I think I am justified in taking the position that you have refused to arbitrate."

(Testimony of Seth R. Brown.)

"Well," he says, "that's all right, if that is your position," and hung up.

Q. Did you have more conversations with any representative of the Register Publishing Company after this? A. No, sir, I did not.

Q. Did you attend a meeting of the union on or about July 25, 1941, in which the question of requesting reinstatement [88] for strikers——

Mr. Sargent: Just a minute. Whatever may be the position of the Examiner with regard to what caused the strike, I submit that what happened later on should not be a matter where Mr. Ryan should lead the witness.

Trial Examiner Moslow: Reframe your question.

Q. (By Mr. Ryan) Did you attend a meeting of the union, the Santa Ana International Typographical Union, on July 25, 1941?

A. Yes, sir.

Q. Can you tell us what transpired at that meeting?

A. The union adopted a resolution to send a letter to the Register Publishing Company requesting a renewal of negotiations, and the reinstatement also of the union—former union members of the composing room.

Mr. Ryan: Will you mark this, please, as Board's Exhibit 7 for identification?

(Thereupon the document referred to was marked as Board's Exhibit No. 7, for identification.)

(Testimony of Seth R. Brown.)

Q. (By Mr. Ryan) Mr. Brown, I show you a document marked Board's Exhibit 7 for identification, and ask you to tell us what it is, if you can.

A. That is the action taken by the union on that date and transmitted to the Register Publishing Company.

Q. Board's Exhibit 7 purports to be a copy of a letter [89] addressed to Mr. C. H. Hoiles, business manager of the Santa Ana Daily Register, Santa Ana, California, dated—not dated—signed "Yours truly, Santa Ana Typographical Union, No. 579," bearing signatures of J. W. Jones, president, C. E. Fisher, secretary. Is that the document that you sent to the Register Publishing Company?

A. Yes, sir, a copy of it.

Mr. Ryan: A copy. I offer Board's Exhibit 7 for identification in evidence.

Mr. Sargent: No objection.

Trial Examiner Moslow: What is the date?

Mr. Ryan: It is not dated, but it appears in the letter when the action was taken.

Mr. Sargent: Probably about the 25th of July.

Trial Examiner Moslow: Is that agreed?

Mr. Sargent: No, about the 25th or 29th. It was just after the meeting of the 25th.

Trial Examiner Moslow: Is that stipulated?

Mr. Ryan: Yes.

Trial Examiner Moslow: Board's Exhibit 7 will be received in evidence.

(Thereupon the document heretofore marked

(Testimony of Seth R. Brown.)

as Board's Exhibit 7, for identification, was received in evidence.)

BOARD'S EXHIBIT No. 7

Live each day so that you can look any man in the eye and say: "I buy under the union label, shop card and button"/

Santa Ana Typographical Union, 579
P. O. Box 51, Santa Ana, California
Member Southern California Typographical Conference

Mr. C. H. Hoiles, Business Manager
Santa Ana Daily Register
Santa Ana, California

Dear Sir:

At a meeting of Santa Ana Typographical Union #579, held on Friday, July 25, the following action was taken by unanimous vote:

The union requests a meeting with the Santa Register Publishing Company for the purpose of renewing negotiations and reaching an agreement for the reinstatement of the former union employes of the The *Santa Daily* Register.

Yours truly,

SANTA ANA TYPOGRAPHICAL UNION #579
J. W. JONES
President
C. E. FISHER
Secretary

(Testimony of Seth R. Brown.)

Q. (By Mr. Ryan) Mr. Brown, after sending the document, Board's Exhibit 7 in evidence, to the Register Publishing [90] Company, did the union receive a reply to that document? A. Yes, sir.

Mr. Ryan: Mark this as Board's Exhibit 8 for identification.

(Thereupon the document referred to was marked as Board's Exhibit No. 8, for identification.)

Q. (By Mr. Ryan) Mr. Brown, I show you a document marked Board's Exhibit 8 for identification, which is a letter under the letterhead of the Register Publishing Company, Santa Ana Register, addressed to Santa Ana Typographical Union, No. 579, Santa Ana, California, dated August 2, 1941, and appears to bear the signature of H. C. Hoiles. I ask you whether or not that is the letter you received from the company in reply to Board's Exhibit 7, which is in evidence?

A. Yes, that is the letter. It is signed by C. H. Hoiles.

Mr. Ryan: Let the record be corrected to read "C. H." I misread it.

Mr. Sargent: No objection.

Trial Examiner Moslow: Board's Exhibit 8 will be received.

(Thereupon the document heretofore marked as Board's Exhibit 8, for identification, was received in evidence.)

(Testimony of Seth R. Brown.)

BOARD'S EXHIBIT No. 8

Register Publishing Co., Ltd.
Publishers of
SANTA ANA REGISTER

California's Most Consistent Newspaper
Santa Ana, California

August 2, 1941

Santa Ana Typographical Union #579
Santa Ana, California

Attention: Mr. J. W. Jones, President and
Mr. C. E. Fisher, Secretary

Gentlemen:

We acknowledge receipt of your letter of recent date which advises us of the action of your Union as of July 25th last.

The Santa Ana Register has never refused to negotiate with you and will not refuse to negotiate with you now. Before sitting down with you, however, we should point out that since your members went out on strike on May 1st last, nearly three months ago, it has been necessary for us to employ others to take the places of those who went out on strike.

These new employes have now become a part of the establishment and we do not feel, in fairness to them, that we can replace them now. Furthermore, shortly after your members went out on strike, we offered, through your Mr. Duke then local Presi-

(Testimony of Seth R. Brown.)

dent, to take back any of your members who were out on strike, whom we believed could be utilized if they returned to The Register because of vacancies we had at that time. These men did not return, however, and it was necessary to fill the vacancies by employing others who are now a part of our staff.

On behalf of the Management I also feel it necessary to indicate to you that there has been no change in our situation since the Union and the Management found it impossible to get together on the questions of increased wages and apprentices.

If you wish to sit down with us, in view of what I have written, the Management will certainly not refuse to confer with you. We think it only fair, however, that before doing so you should be given our attitude, as outlined above.

Sincerely,

REGISTER PUBLISHING CO., LTD.

By C. H. HOILES

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Q. (By Mr. Ryan) Since receiving the letter of the company, which is in evidence as Board's Exhibit 8, has the union contacted the Register Publishing Company in any manner, personally or by letter? [91]

(Testimony of Seth R. Brown.)

A. Not officially, unless it has been by some individual.

Q. Have the strikers ever been reinstated to the employ of the Register Publishing Company, Ltd.?

A. No, sir.

Mr. Ryan: I have no further questions. You may cross examine.

Trial Examiner Moslow: We will recess for five minutes.

(A short recess was taken.)

Trial Examiner Moslow: The hearing will come to order.

Cross Examination

Q. (By Mr. Sargent): Mr. Brown, in your long experience you have seen a great many I.T.U. contracts with large and small shops, haven't you?

A. Yes, several.

Q. "Several" is being very conservative, isn't it? You have probably seen hundreds, haven't you?

A. I think so, yes.

Q. Isn't it true that even today, when clauses are somewhat more standardized than was the case formerly, that there is quite a variation between the clauses of the large and small newspapers?

A. Well, there is some differential. So far as the work they shall perform in the first five years, yes.

Q. Are you familiar, for example, with the contract now in existence in San Diego between the Typographical Union and [92] the papers there?

(Testimony of Seth R. Brown.)

A. No, I don't know all its provisions.

Q. Would you be surprised to know that there were a great many changes in that contract under the terms of the Los Angeles contract and the contract for other papers in Southern California?

A. Oh, I wouldn't be surprised, no. The——

Q. In other words, it is a normal thing, when you have a negotiation of I.T.U. contracts, to take into consideration the things which are of importance to the local union and to the local paper? Isn't that correct?

A. If the International mandatory laws are complied with, yes.

Q. And are you familiar with the practice whereby, when the local in a given community, and the paper, want to have something which is peculiar to them, that they write back and get waivers from the I.T.U. in regard to it?

A. You mean a waiver in a mandatory law?

Q. No. I am talking about a waiver on a clause which would ordinarily not be agreed to by the executive committee, but which is approved by the particular local. A. Approved by whom?

Q. By the I.T.U. Executive Committee.

A. The executive committee doesn't approve it. The president approves it. [93]

Q. All right. You are familiar with many instances, are you not, when a contract is negotiated by the local union and paper, that the draft is sent back before the contract actually is final between the two parties, and an international officer, the

(Testimony of Seth R. Brown.)

president or some other appropriate official, will give a leeway whereby the particular contract may be changed to suit the local and the paper who have already agreed upon it?

A. No, I am not familiar with that. I am familiar with the fact that scales when adopted by a local union are sent to the president of the international for approval, before being presented to the local paper, to see whether they are in accordance with international law, and if not in accord with the international law, he points out what it is, and sends it back to the local union, and those changes are made before it is submitted to the publishers.

Q. Isn't it true that the only scales which are a matter of international law are those almost substandard scales below which no contract can go, and all other scales are a matter of negotiation between the paper and the local?

A. I don't know as to that. I don't know exactly what you are trying to arrive at there.

Q. Never mind that. Never mind what I am trying to arrive at. Just give your experience.

A. I would say the provisions in the contracts vary very [94] materially in different communities, but there are certain provisions that are incorporated in all contracts that are underwritten.

Q. Do you mean to indicate the clauses in all contracts with regard to apprentices are the same?

A. No, I don't mean to say that.

Q. Of course you don't.

A. I didn't so state.

(Testimony of Seth R. Brown.)

Q. In other words, clauses with regard to apprentices, change according to the situation in the particular plant and according to the agreement which is arrived at tentatively, subject to International approval, between the local and the publisher. Isn't that true?

A. Yes, that is what you have got——

Q. Let me ask you this:——

Mr. Ryan: Just a minute. The witness wants to finish his answer.

Mr. Sargent: I am sorry. Go ahead.

The Witness: That is subject to the ratio in effect under international law, as to how many apprentices they are expected to be permitted to have.

Q. (By Mr. Sargent): Don't you know of contracts where a greater percentage of apprentices is permitted, because of the local situation, than are contained in the by-laws in evidence here today?

[95]

A. I don't know of my own knowledge, no; but there may be contracts in existence where publishers are given more apprentices than they have been given in Santa Ana. I don't know. But I don't know of any contracts where the provisions of international law are not adhered to.

Q. Don't you know of any contracts where there are more apprentices than one to every five journeymen?

A. No, I don't know, of my own knowledge, of any such underwritten by the president of the International Typographical Union.

(Testimony of Seth R. Brown.)

Q. Would you be surprised if I showed you contracts where that is done, in certain isolated cases?

A. I would be surprised if it had the approval of the president of the International Typographical Union.

Q. You can't have a contract between a local and a publisher without the consent of the International Typographical Union?

A. Oh, yes, you can.

Q. Doesn't it all go to the International before it is signed?

A. Yes, but they are not all signed.

Q. If an International officer sends back word to the local that they can't sign, they don't sign it, do they?

A. Supposing they have already signed it.

Q. You don't know that even in regard to the subject of [96] apprentices there is a wide variation in the type of clauses in the various local contracts throughout the Southwest?

A. I think that is true with reference to matters open for negotiation.

Q. You said a few moments ago that there was something in the international by-laws, constitution and by-laws, which prohibit the acceptance of the management's approval, under date of April 26th, with regard to apprentices. Did you make that statement on the stand? A. I think so, yes.

Q. Will you please show me what particular

(Testimony of Seth R. Brown.)

provision it is in the by-laws which prevents the acceptance of that proposal?

A. I think I read it here at the time.

Trial Examiner Moslow: Point it out again. Take the 1940 by-laws.

The *Section*: Section 17.

Q. (By Mr. Sargent): Will you read 17, please?

A. Yes, sir. "Local unions shall incorporate in their contracts with employers a section containing the necessary requirements to carry out the apprenticeship laws of the International Typographical Union."

Q. What is the requirement of the International Typographical Union to which this clause, Section 17, applies? A. What are the laws? [97]

Q. Yes. What is there in the law, or any part of the book there which says you can't train apprentices during the year, some year before the sixth year, in linotype or other machinery?

A. Section 13.

Q. Read Section 13.

A. "Arrangements should be made to have apprentices during the sixth year instructed on any and all typesetting and type casting devices in use in the offices where they are employed."

Q. Isn't that clause that for the better training of apprentices the I.T.U. takes the position that they must be trained by the sixth year, before they become journeymen, in full recognition of their new status? Isn't that true? A. No, sir.

(Testimony of Seth R. Brown.)

Q. Can you show me any clause there which says that they can't train apprentices until the sixth year?

A. No, I can't give any specific reference.

Q. No.

A. But that provision has always been recognized all down through the years——

Q. No, but——

Trial Examiner Moslow: Let him finish.

The Witness: ——as being the position of the International Typographical Union, that the apprentices are only permitted to work on a machine during the last year of their [98] apprenticeship.

Q. (By Mr. Sargent): And only apprentices and journeymen can work on machines. Is that correct? A. That is all, yes.

Q. In other words, the only people that can work on the linotype machines are the journeymen printers and sixth year apprentices. Is that correct?

A. In union offices, yes.

Q. Or in this office?

A. You mean as now constituted?

Q. As constituted prior to the strike on April 30th.

A. That is right, they couldn't, no.

Q. Do you know that during the first summer you ever worked on the paper, that the daughter of the publisher of this paper was permitted, with the consent of the union, to operate a linotype machine on which she hadn't had even three months experience? A. I haven't any knowledge, no.

(Testimony of Seth R. Brown.)

Q. If the evidence shall disclose that, you will be very much surprised, will you not?

A. I wouldn't say I would be surprised. I think you can get that information from some member of the union. I haven't the knowledge.

Q. No. But if it is true, that in the summer of 1939, 1940, a girl comes back from school, who is permitted with the [99] consent of the union to operate one of these machines, that would be totally contrary to the international law?

A. Was the product used?

Q. I don't know. But if she was permitted to operate one of the machines, it would be contrary to international law, would it not?

A. It would be, if the product was used. If the product was not used—if the person operating the machine were a relative or a student, I doubt very much if the union would want to insist on a proposition of that kind, providing the product was not used.

Q. So, if she was a relative there would be an exception made in that case?

A. I don't say that. I simply pointed out that if the product was not used, I don't think the local union would make an issue, especially with the family.

Q. I see. The question of whether or not the apprentices should be trained at the machines, the linotype machines, and other machinery, during the sixth year, was the real difference of opinion be-

(Testimony of Seth R. Brown.)

tween you and the management during the negotiations, both in 1940, and 1941, were they not?

A. One of the reasons.

Q. What else was particularly involved in your discussions, as a difference of opinion?

A. The unlimited number of apprentices. [100]

Q. At that time how many journeymen printers were employed at the Register plant?

A. You mean in 1940?

Q. 1940 and 1941 up to the strike?

A. Oh, I think about 22.

Q. 22?

Trial Examiner Moslow: Apprentices?

Mr. Sargent: No; journeymen.

The Witness: No; journeymen.

Q. (By Mr. Sargent): How many apprentices did they have? A. Three.

Q. Three; and under the by-laws, both in 1940 and 1941 and 1942 they would have been permitted to have four, would they not?

A. Yes, they would under that.

Q. As a matter of fact——

A. Except that the agreement was made that there be three.

Q. In other words, you had in your verbal agreement held the Register to a lesser number of apprentices, had you not, than the limit or proportion contained in the international laws?

A. By mutual agreement.

Q. It was one of the terms of the verbal agreement, as I understand it? A. Yes, sir. [101]

(Testimony of Seth R. Brown.)

Q. That was one of the things which the management was trying to get away from in its contract?

A. They wanted to have the sky the limit.

Q. They wanted more than three?

A. Yes; sure.

Q. I ask you whether there was anything in the international laws in 1940 or 1941, up to the time of the strike, which would have prevented you giving them more than three?

A. I think they were entitled to four under the law.

Q. And possibly five?

A. It might be. You would have to stretch it.

Q. Under a "stretch" interpretation, they are entitled to one for every five journeymen, or fraction thereof; that would have given them five, and you had an agreement whereby they could have only three? A. That is right.

Q. And the management said that was working an unfair hardship upon it, and it wanted to have more than three?

A. No. He said he didn't want any restrictions upon the number they could employ.

Q. He said they wanted more than three.

A. Yes; but he didn't say four or five; he wanted complete control.

Q. Did you say "We will give you four or give you five"?

A. No, sir. It wasn't mentioned. [102]

(Testimony of Seth R. Brown.)

Q. During any of the negotiations did you ever offer to give them four or five?

A. Not in these negotiations; it wasn't requested. He wanted unlimited control.

Q. The answer was: You never offered a counter-proposition and said he could have four or five, did you? A. No, sir.

Trial Examiner Moslow: Where is the provision that limits the number of apprentices? What section is that?

The Witness: Section 20 and 21.

Trial Examiner Moslow: Contine.

Q. (By Mr. Sargent): Now, in all of these negotiations, Mr. Brown, you, at all times as representing the union, certainly were in good faith, were you not? A. Yes; I tried to be.

Q. You were bargaining in good faith, representing your union, at all times, in an effort to bring about a satisfactory conclusion, were you not?

A. Yes, sir.

Q. And yet, during these negotiations, you never told this employer, as a counter-proposal, that they could train apprentices earlier than the sixth year, did you? A. Train them on the machines?

Q. That is right.

A. I never told them so. [103]

Q. And you never in the negotiations told them that you would compromise by giving them four or five apprentices, when they asked for unlimited numbers?

A. They didn't ask for four or five.

(Testimony of Seth R. Brown.)

Q. Please answer my questions, as I put them. You never counter-proposed, when they asked for an unlimited number? A. No, sir.

Q. By saying they could have four or five?

A. No, sir.

Q. You didn't think that by failing to make a counter-proposal of that nature, that there was anything of bad faith in your negotiations, did you?

A. I was thoroughly imbued with the idea that three was sufficient for an office of that kind.

Q. But, in not making any counter-proposals of that nature, you didn't think you were doing anything other than in good faith, did you?

A. I didn't think anything about it.

Q. You believed just as strongly in your position that they should have only three, as the management did that they should have a larger number, didn't you? A. Yes, sir, I did.

Q. You knew, so far as the management was concerned, if it had had a larger number, it probably would have meant having [104] a less costly operation, from its viewpoint, in the shop?

A. I don't think so, no.

Q. The management told you, during the negotiations, it wanted more apprentices because it belived it could have a less costly operation, did they not?

A. They never so expressed themselves. As I understand it, they thought that the union was exploiting the apprentices and compelling them to

(Testimony of Seth R. Brown.)

serve six-year apprenticeships. That was their position, and we don't think so.

Q. You both had an honest difference of opinion, didn't you?

A. I don't know how honest theirs was. I know how honest ours was.

Q. Yours was an honest difference of opinion, and on that you had a position which you stuck to at all times throughout, didn't you?

A. We tried to conciliate.

Q. You never offered a compromise once on anything with regard to apprentices, did you?

Mr. Ryan: Mr. Examiner, I object to the entire line of questioning.

Trial Examiner Moslow I will sustain the objection.

Mr. Sargent: I have no desire to encumber the record with unnecessary things, but remember, Mr. Examiner, that in this one witness is the heart of the whole matter.

Trial Examiner Moslow: You have asked the same questions [105] about three times.

Q. (By Mr. Sargent): On the question of wages there was an opportunity there to negotiate back and forth, and eventually there might have been an opportunity to get to a compromise. Is that right? A. Yes, sir.

Q. Now, when you, around March 1, 1941, had entered into a negotiation with the commercial plants for a wage scale, was the respondent, that

(Testimony of Seth R. Brown.)

is, the Santa Ana Register, represented in those negotiations? A. No, sir.

Q. As a matter of fact, you never told them about those negotiations at all, until after they took place, did you? A. I can't say.

Q. Well, you had never done so?

A. I had nothing to do with the job scale when it was presented here, and signed.

Q. And when you had that contract with the various commercial shops providing for an increase above the $1.00 per hour, that established what, in your opinion, was a prevailing rate of wages. Is that right? A. We so construed it.

Q. Up to that time it had been $1.00 an hour?

A. Yes, sir.

Q. So that during the negotiations in 1940 the prevailing [106] rate of wage had been $1.00 an hour, had it not? A. Yes, sir.

Q. When you were, therefore, negotiating with the Register's representatives in 1940, what, in fact, you had been doing was trying to get the Register to agree to a wage scale which was above the going scale. Isn't that true?

A. Well, of course, Mr. Sargent, scales are opened by the local union, and it so happened the newspaper scale was opened previously to the commercial scale.

Q. I understand that, but still it is a question, and there is nothing wrong about doing it, Mr. Brown. If I were representing a union I would certainly do it. But, what you were asking the

(Testimony of Seth R. Brown.)

paper to do was agree to a scale at that time above the prevailing scale, were you not?

A. You mean here?

Q. Yes. Yes. A. Yes, that is right.

Q. And the management simply took the position that it wouldn't go above the scale in 1940?

A. No, they didn't say that.

Q. That was the effect of the negotiations.

A. I don't think it was discussed, about what wages were paid in commercial offices, in 1940. It was in 1941.

Q. In 1941, after you had had this first agreement with respect to the commercial shops, you took the position that [107] then, after that contract, there had been a new and a higher wage scale put into effect. Is that right?

A. I think that was one of our contentions, yes.

Q. And you said to the management of this paper that now that the commercial scale is $1.07, that that sets a new prevailing wage scale for this community. Is that correct?

A. I think the communication itself will be the best indication of how the union felt. It could be introduced.

Q. Now, Mr. Brown, after all, you are an expert in these matters. You have been in the labor business for 45 years in this union——

A. You are getting a little ahead of me there.

Q. I am just trying to probe your mind on something very important in this case.

You took the position during these negotiations,

(Testimony of Seth R. Brown.)

to which you have testified, that a new prevailing wage scale had been adopted, through the March 1st contract, with the commercial shops, did you not?

A. Yes. That was one of our contentions, but we contended that the cost of living and other matters, and the general raising of wages in the other jurisdictions, had quite an important bearing on it.

Q. Did you ever have any discussion with the management about the fact that national advertising was going down? I am talking about 1941, now.

[108]

A. I believe there was some talk about it. We didn't bring it up. It was brought up by the publishers.

Q. The management, of course, brought this up, didn't it? A. I will say they did.

Q. And Mr. Hoiles made the remark to you: "Our national advertising is down. We are getting to a place where our revenues are cut. Where is the money going to come from to pay increased wages, if we agree to them?"

Didn't he say that, in substance?

A. He said they couldn't raise the newspaper rates, but he did, afterwards.

Q. At that particular time he said he couldn't do it, did he not? A. That is right.

Q. At all times when you have referred in your testimony to Mr. Hoiles, it is to the gentleman sitting on my left, Mr. C. H. Hoiles?

A. That is right, Mr. Sargent.

(Testimony of Seth R. Brown.)

Q. And at no time when you mentioned Mr. Hoiles did you mean other than Mr. C. H. Hoiles?

A. I never met Mr. R. C. Hoiles personally.

Q. Now, when you establish a prevailing scale and it becomes established as a prevailing scale, are you then willing to negotiate that scale downward for some particular individual paper, like the Register? [109]

A. Well, not unless the conditions warrant it.

Q. And you saw nothing in the conditions in 1941 which would warrant it, in your opinion?

A. In reducing the scale?

Q. After March 1, 1941, in going below the new commercial scale?

A. We thought the newspaper wage was too low here. That is the reason why we adopted a new scale.

Q. And you held to that scale throughout, in these negotiations, did you not?

A. We did, as a committee, although I suggested to Mr. Hoiles on this afternoon before the strike, if he would withdraw his proposition in reference to the apprentices and get together, we would further confer upon the wage situation. I didn't promise we would do anything, but I did say I would do everything in my power to avoid any trouble down there.

Q. Did you at that time secure any authority from the local to go back on what you call the prevailing scale?

A. No, sir. I had no such authority, but I am

(Testimony of Seth R. Brown.)

one of those individuals, if I find a situation that I believe a person should step in and try to avoid trouble, that's what I intend to do. I would have done that, if I had been met halfway on the proposition.

Q. That shows you are a good negotiator, and I won't quarrel [110] with you on that.

In any event, no authority was given to you, or given on the part of the union, to suggest or to agree to any scale lower than the March 1, 1941 new commercial scale? A. No, sir.

Q. And in adhering to that scale you believed that you were doing the right thing, and that you were negotiating in the best of good faith, did you not? A. Yes, sir.

Q. Now, let us go back for just a moment to the provisions of the so-called verbal agreement, which as I understand from your direct testimony had been in effect from about 1937 until some time, as to which you have given no particular date, in 1940, or 1941.

First of all, let me ask you this question: Did you mean to indicate upon your direct testimony that that verbal agreement was no longer in effect after March of 1940? A. No, sir.

Q. As a matter of fact, that agreement was in effect up until the very day of the strike, was it not?

A. Yes, sir.

Q. And at all times, therefore, the management was bound by the terms of that verbal agreement? Isn't that so?

(Testimony of Seth R. Brown.)

A. They were bound by it, yes.

Q. And the reason why they couldn't have more than three [111] apprentices was because in that particular verbal agreement they had said "We will limit ourselves to those three apprentices only." Isn't that so?

A. Yes, but they never made any request for four apprentices.

Trial Examiner Moslow: Can we get a copy of the terms of the oral agreement, gentlemen?

Mr. Sargent: I don't know who has one. I have tried to get one, but haven't put my finger on one yet.

Mr. Ryan: I have a document here that I propose to establish by this witness as being an identical document with that which was in effect between the union and this company.

Mr. Sargent: Could I take a hasty look at it?

Trial Examiner Moslow: Why don't you show it to Mr. Sargent and see if you can agree on it? Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Q. (By Mr. Sargent) Mr. Brown, I have received from Mr. Ryan, counsel for the Board, and I understand he got it from Mr. Duke, the president of the union, a contract which is stated to be similar to the one under which the Register was operating from 1937 up to the date of the strike, or April 30, 1941, and which is also with the Santa Ana Typographical Union, No. 579.

(Testimony of Seth R. Brown.)

Will you glance at that and tell me whether or not in [112] your experience and from your information that is a similar contract to that which was in force at the Register prior to the strike?

A. Well, there was one proviison in here that was amended when the matter was submitted in 1939. That's part of subsection (a) of Section 2, "Working Hours." With that exception, it is practically the same.

Q. Generally speaking, it looks as though it was similar in terms to the other?

A. That is right.

Trial Examiner Moslow: You say "similar". Do you mean the same as——

The Witness: The same as the newspaper contract, yes, in general terms.

Trial Examiner Moslow: I don't understand what you mean by general terms. Is that identical with the agreement between the respondent and the local union except for paragraph 2 (a), or does it just bear some resemblance to it?

The Witness: I wouldn't say positively, but it looks to me to be the same contract as the newspaper contract.

Q. (By Mr. Sargent) It is a printed contract, where the name of the person with whom the contract was made has been written in. Is that true?

A. Yes, it's written in. The name is written in in all those contracts. [113]

Q. So that you believe, by reason of its being a printed contract, and from your experience of it,

(Testimony of Seth R. Brown.)

that it is identical except for the one clause to which you have referred?

A. It is, so far as my knowledge goes, but I wouldn't want to say positively it is the same.

Mr. Ryan: Mr. Sargent, I will stipulate it is an identical document with the contract which was entered into between the International Typographical Union and the company, the Register Publishing Company, Ltd., 1937, and that the qualification with respect to that clause, that the witness has testified about, paragraph 2 (a), was also identical, with the exception that in their discussions back and forth on that term, they agreed to draw some lines on the contract; but the contract as a physical document is identical with that of the contract entered into by the company and the union. I will stipulate to that.

Mr. Sargent: Would you care to stipulate approximately how many clauses there are in the contract? Between 30 and 40, would you say?

Mr. Ryan: Why not introduce it in evidence?

Mr. Sargent: Will you stipulate that there are at least 30 to 35 clauses of various kinds and description in this contract, Mr. Ryan?

Mr. Ryan: No, I won't, because I don't think it serves any real purpose. I think the best evidence is in the contract [114] itself, and the physical document should be in evidence, if we are going to discuss it.

Trial Examiner Moslow: You don't need to

(Testimony of Seth R. Brown.)

stipulate, Mr. Sargent. I can count the number of clauses.

Q. (By Mr. Sargent) Mr. Brown, ——

Trial Examiner Moslow: Just a second. Is it agreed that is an identical contract, or what is your viewpoint?

Mr. Sargent: May we go off the record?

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Mr. Sargent: From the information given by the witness, and also from the statements made by Mr. Ryan and Mr. Duke, and without knowing full particulars myself, I am willing to accept for the present at least, until I know to the contrary, that the document which I now hand to the Examiner for identification as Respondent's Exhibit 1 for identification is a similar contract to that which was in effect as a verbal contract between the Typographical Union, Local No. 579, and respondent, during the years 1937 through the strike, in April 30, 1941.

Trial Examiner Moslow: Mr. Sargent, can't you stipulate that the terms are identical with the terms of your contract, and if it should appear later that you were mistaken, I will allow you to withdraw from your stipulation. Meanwhile, I [115] would like to have some paper in evidence so we can follow this discussion.

Mr. Sargent: It is like asking a question of a witness and you don't know what the answer will be. I am so in ignorance of what the terms are——

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: We will postpone the entire matter. Will you take the contract to your office and look at it over night?

Mr. Sargent: Yes.

Q. (By Mr. Sargent) Now, Mr. Brown, during the various discussions between you and the management of the Register in 1940, there were very few items of dispute between you. Is that right?

A. On wages and vacations with pay.

Q. Wages, vacations for pay, and what about apprentices?

A. I don't think—we went into the subject, of course, and that was a contention; but there was no —in other words, you seem to object to my stating that they didn't ask for four or five apprentices. They did not ask for any definite number of apprentices, so that we could have got together and discussed the question. They wanted unlimited numbers of apprentices.

Q. I understand your position perfectly. What I am asking you now is whether or not it isn't true that during the 1940 negotiations, the only three things which seemed to be in any [116] serious dispute between you related to: One, wage; two, vacations; and three, apprentices?

A. Yes, and to a lesser degree, upon a provision that upon one day a week they went to work at 6:30, I think, which was a violation of the laws providing for day and night work.

In other words, they went to work at 6:30 in the morning, without paying a night scale. As you

(Testimony of Seth R. Brown.)

know, the hours are from 7:00 in the morning until 6:00 at night, for day work; and from 6:00 at night until 7:00 in the morning for night work. And any work performed in the daytime, not in those hours, that is paid for at the night scale.

Q. I understand.

A. That wasn't a serious problem. It was discussed a little, and I don't think the office itself wanted to continue it, although they didn't give it up.

Q. I will ask you whether or not during the 1940 negotiations the management didn't agree to the union's position, and didn't change and somewhat more liberalize the viewpoint of the union, the hours of the day and night shifts, and meet the union's proposal?

A. There was nothing done at all. The negotiations were just terminated, left in status quo.

Q. During 1940 or 1941 didn't the management agree to the union's proposal about the hours, as to whether it was day or night shifts? [117]

A. I think they would have. I don't think he ever made any statement that they would, but I think he seriously doubted the question of going to work at 6:30 was beneficial to the office, and I think he would have been willing to terminate it. But it was in violation of the international laws, and had been called to the attention of the local union here by the International.

Q. Your judgment was, from the negotiations, the management would have interposed no objection

(Testimony of Seth R. Brown.)

to this proposal of the union, had other things been agreeably settled?

A. I don't know. I couldn't say.

Q. I thought you said a moment ago you thought the management would have agreed to that if other things had been taken care of?

A. I don't think they wanted to maintain a union shop, if they could avoid it. That's my private opinion, publicy expressed.

Mr. Sargent: I will ask that go out as non-responsive to the question.

Mr. Ryan: I object, and insist that the answer stay in the record. He has asked the witness' opinion as to whether the company would agree or not agree.

Trial Examiner Moslow: I will grant the motion to strike as to his opinion about the respondent's motives.

Q. (By Mr. Sargent) Mr. Brown, in the negotiations, if [118] you know, prior to March of 1940, were there various changes during the years 1938 and 1939 and thereafter, from the original terms of the original verbal agreement?

A. I couldn't say how many changes, Mr. Sargent. The wage question itself was taken up at various times, and any new laws that were considered mandatory by the International Typographical Union were inserted in future contracts.

Q. So that, from time to time, there were changes made each year in the original verbal agreement of 1937? A. Yes, sir.

(Testimony of Seth R. Brown.)

Mr. Ryan: Mr. Examiner, in order to avoid confusion in the record, by referring to this agreement between the company and the union as the verbal agreement, I would like it understood, whenever that reference is made, it must also be borne in mind that that so-called verbal agreement was reduced to writing, and was a written, unsigned agreement of the terms of that so-called verbal agreement between the company and the union.

Trial Examiner Moslow: I understand.

Q. (By Mr. Sargent) In other words, the agreement was verbal, but the terms had been reduced to writing? Is that correct? A. Yes, sir.

Q. Were you, Mr. Brown, aware when you came to the negotiations in March 1940, and during the negotiations in 1940 and also in [119] 1941, of what the going wage scale was on such papers as the Santa Barbara, San Bernardino, Riverside and Pomona?

A. Well, the cities that you enumerate there I notice are all operating under non-union conditions, except Pomona, which has been unionized since then, and has an increase in the scale of $2.50 a week.

Q. At that time were you familiar with the wage they were paying?

A. Well, I was more or less familiar, yes.

Q. And I ask you whether or not the wage scales which were being paid in those papers for similar typographical work were not the same scales which were being paid by the Register at the time?

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: Your question is that the Register was paying the same amount of money as these non-union papers?

Mr. Sargent: That is right. At least as much.

Q. (By Mr. Sargent) Isn't that true?

A. I couldn't say definitely whether it is true or untrue. I know what the scale at Santa Barbara is right now, but I don't know exactly what it was at that time.

Q. Do you remember the scales at Santa Barbara, Pomona, San Bernardino, and Riverside were —whether the scales there were higher or lower for printers as compared with the respondent, in the years 1940 and 1941 up to the day of the [120] strike?

A. The scale in Pomona was $1.00 an hour and there were negotiations for a new contract, just the same as there were down here.

Now, at San Bernardino, it is not under union conditions down there. They are operating with a non-union force, and any information that I would secure on the wages paid down there would be more or less from a third party. But I am sure that they weren't any lower or higher than paid here in Santa Ana.

Q. Yes. You and I, Mr. Brown, might agree as to union shops, but some other people don't. I simply took those, knowing they were non-union shops, as comparable cities where, whatever the reason might be, similiar scales were in effect at the time.

(Testimony of Seth R. Brown.)

A. How about Glendale and Santa Monica, and a few more? Ventura?

Q. Of course, you are talking about papers I sometimes negotiate with. Remember, you are getting up into metropolitan scales when you are talking about Glendale and Santa Monica. We hadn't better go into that.

A. Well, I simply——

Trial Examiner Moslow: Don't volunteer any information, until you are asked questions.

Q. (By Mr. Sargent) Now, I believe you suggested that at [121] the meeting on May 20, 1940, the company, that is, the respondent, submitted seven proposals.

Trial Examiner Moslow: Did you say May 20th?

Mr. Sargent: May 20, 1940.

Mr. Ryan: It is March 20th, isn't it?

Mr. Sargent: March 20th, I am wrong.

Q. (By Mr. Sargent) March 20, 1940, they submitted seven proposals to the union at a meeting at which you were present. Is that correct?

A. No, I wasn't present at the meeting.

Q. I had you down as saying you were present.

A. No, sir.

Q. Weren't you and Mr. Taylor of the union present at that meeting?

A. You mean present at the meeting of the publishers when those points were submitted?

Q. Yes.

A. No, sir; they were submitted during the interim between the first meeting held, at which I

(Testimony of Seth R. Brown.)

was not present, and the next meeting, at which I was present.

Q. Weren't the points discussed at the March 20th meeting?

A. Either that meeting or the next meeting. I think at both meetings.

Q. Regardless of that, you were present at a meeting when the Register's management, through Mr. Hoiles, did submit [122] seven proposals to the union. Is that right?

A. I was there when it was discussed, yes. I wasn't there when they were submitted.

Q. All right. You were present when the seven proposals submitted by the management were discussed, at a union meeting? A. Yes.

Q. At that meeting did Mr. Hoiles indicate that there was a vast difference between the scale, and experience needed for straight matter work, and the more or less complicated work, such as complicated display advertising matter?

A. He talked about it, yes.

Q. Did you agree that in so far as the amount of the scale was concerned that there was a wide difference in the two types of work?

A. We didn't agree to his interpretation, no.

Q. As a matter of fact, isn't it true, Mr. Brown——

A. As a matter of fact, there are very few machines on which only straight matter is set on, what he is calling straight matter, and that is the news. But in a newspaper office, the operators as a rule

(Testimony of Seth R. Brown.)

have to perform all classes of work on the machines, liners, and ad display, and baseball scores, and so forth, tabular work, and it is only during certain hours of the day that the whole force is thrown upon the news matter. Most of those operators [123] perform these various tasks during a day.

Q. I will agree with what you said. I just wanted to get from you certain statements, which I think you are perfectly willing to make, and which I believe would be true; granted that an ordinary man, machinist-operator, has to do a great many things, if a person were only called upon to do straight matter, that would be a much easier job, than when he is doing a lot of things.

A. You mean if he only had to perform that work all the while?

Q. That task, of printing just straight matter doesn't require the skill that the other duties which you have testified to require. Isn't that true?

A. Why, it doesn't require the skill some other matters do, no. Of course not.

Q. So that, when you objected to the 75 cents an hour for the men on straight matter, your objection was that there shouldn't be any distinction between operators, even though you recognized that this was a simpler type of work than the general display advertising and other matters? Is that true?

A. Our position was that all scales were minimum scales, and if the publisher has anybody in the composing room that is not competent to earn

(Testimony of Seth R. Brown.)

this minimum wage, he has got recourse to discharge that particular individual. [124]

Q. Do you think that nobody should be employed in the composing room except as he gets a journeyman's minimum scale?

A. I think he should get at least a journeyman's minimum scale.

Q. At least the journeyman's minimum scale. Is that right? A. Sure.

Q. What about all these contracts where you have super-annuated—or people who are 60 or 65 years old, so that it is a question of experience, or whether the employer wants to keep them, and the union has obligations to them; what happens then?

A. That is in isolated cases. I don't think there is one in this office, and very few offices have them. Occasionally they have them, yes.

Q. You know I could give you a number of cases where they have them, don't you?

A. Yes.

Q. And you also know there are exceptions to the ordinary journeyman's scale, don't you?

A. Yes.

Q. If a particular publisher has a great deal of ordinary news matter as contrasted with complex display advertising, it is possible, is it not, that certain people might be employed full time on the straight matter alone? Isn't that [125] true?

A. They might be employed, yes; but they might not be competent. I don't know.

(Testimony of Seth R. Brown.)

Q. Your position is not that the work should be paid at as high a rate as something more skilled, but that every person in the place, except for superannuates, or apprentices, or proof boys, but everybody except for superannuates or sixth year apprentices should be paid the minimum, the minimum for everybody?

A. Our position is that the pay should be at least the minimum scale of the union; and if a man shows himself to be more competent, he should get an additional rate per hour, week, day, or hour, wherever the occasion arises. That is my position on that.

Q. Is it common practice for journeymen printers to receive above the scale?

A. A great many do, yes.

Q. There are cases——

A. Any number of them.

Q. Isn't it true the average case is that the man receives the scale?

A. He is to receive the scale.

Q. I mean, he doesn't receive above the scale?

A. I think the majority of people do not receive over the scale, if that is what you mean. [126]

Q. Yes. Now, then, is your objection to the suggestion made by the management that those on straight matter receive only 75 cents per hour instead $1.00, back in 1940, was it your objection that it would reduce the minimum scale, or was it that the work itself was worth as much as advertising display, and so forth?

(Testimony of Seth R. Brown.)

A. We maintain that any work performed by an operator in a composing room should be paid what it is worth, and if what it is worth equals—in other words, a man, no matter what he is employed at, whether it is on straight matter or display matter or any other matter, he should receive at least an equal scale; this man may be a mere straight matter operator, but may be the swiftest man in the office, and may produce the largest string of anybody. But the office might not construe him as being what they called a competent operator.

Q. Would you think that the man who was just fulfilling his ordinary production competency, of so many strings, with no surplus, should be paid the same as the man who was producing 50 per cent above the minimum required?

A. I think every person employed in a composing room should receive a minimum scale of the union, at least the minimum scale, and if those men are not competent to receive that scale, the office has recourse to discharge them.

Q. Why does the union object, providing it doesn't drag [127] down the scale of those who are experienced, all around machinists and operators, such as those who have to do with intricate display advertising, why does the union object to there being a sub-minimum, if you please, for doing what is in reality a much more simple task, requiring much less experience?

Trial Examiner Moslow: Are you questioning

(Testimony of Seth R. Brown.)

this man about the union's general policies, or about these negotiations?

Mr. Sargent: On these negotiations, because these were part of these negotiations.

Trial Examiner Moslow: Will you reframe your question?

Q. (By Mr. Sargent): Why did you object in these negotiations, Mr. Brown, to the management's proposal that a person who was on straight matter alone might receive only 75 cents per hour as a minimum, providing it didn't take or drag down the general scale of those who were engaged in much more intricate work such as display advertising?

Mr. Ryan: Well,——

Trial Examiner Moslow: I will sustain the objection. It is repetitious.

Mr. Sargent: I don't think he ever answered.

Trial Examiner Moslow: I think he answered three times that he thought the minimum should be a dollar, regardless of the class of work performed. [128]

Mr. Sargent: Mr. Examiner, that doesn't answer my question.

Trial Examiner Moslow: It isn't an answer to the question, that the minimum should be a dollar, regardless of the type of work?

Mr. Sargent: I was trying to get the basis for the reason. In other words, I wanted to find out why he had objected so strenuously to Mr. Hoiles' proposal, which, of course, would have led the way to

(Testimony of Seth R. Brown.)

higher wages for the other people, eventually, had it been put into effect; because you could have run your composing room for the same cost; I don't like to use the word "substandard" but 75 cents would have permitted you to have leeway.

Trial Examiner Moslow: Are you contending that the company proposed to increase the rate for the classification above a dollar an hour?

Mr. Sargent: It didn't get to it, because the union wouldn't agree to any classification of less than a dollar an hour.

Mr. Ryan: There is nothing in this record——

Trial Examiner Moslow: Let us not argue about it. Let us proceed.

Mr. Sargent: May I have the question read, please?

(The question was read.)

Trial Examiner Moslow: And I think I sustained the [129] objection to that question.

Q. (By Mr. Sargent): Now, coming to the question of apprentices, an apprentice who has been working faithfully for two or three years could easily learn the work of the machines prior to his sixth year, could he not?

A. Oh, he could, yes. He could learn the machine, but he wouldn't be a printer.

Q. I understand.

A. He would be one of these straight matter operators.

Q. I see. But it would give a greater number

(Testimony of Seth R. Brown.)

of people to the shop who would be able to use the machines at the same time, would it not?

A. It would what? I don't understand the question.

Q. I will reframe it. If you had apprentices, even though they had only two or three years, who could still operate the machines, on straight matter, you would have, in the event of a rush, a lot of people who could operate the machines?

A. That all depends on your equipment. I think all the machines over here were manned most of the time.

Q. Couldn't you answer my question yes or no? It is obvious, isn't it? You would have a greater number of people to operate the machines, in any given plant?

A. If you were permitted to do so, probably so.

Q. The more leeway the management has in a composing room, [130] the less its proportionate cost for getting out production. That is true, is it not? A. Probably so.

Q. It has been true for many years, has it not, that the union has sought through its various locals, internationally, to hold to a minimum the number of apprentices in any job?

A. They had discouraged it, in many instances, yes.

Q. As a matter of fact, you and I know of certain contracts where no further apprentices beyond those employed are permitted. Isn't that true?

(Testimony of Seth R. Brown.)

A. In some contracts, yes, I believe. I couldn't give them to you specifically.

Mr. Ryan: Will you read the question and answer?

(The record was read.)

Mr. Ryan: I don't understand the question.

Trial Examiner Moslow: You say you don't?

Mr. Ryan: I don't understand the question.

Trial Examiner Moslow Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Q. (By Mr. Sargent): Now, in March 27, 1940, you said that there was no change in either party's proposals, that the union wanted a 15 cent increase in wages and the union also wanted one week's vacation with pay. Is that right?

A. That is right. [131]

Q. I ask you whether or not it hasn't been just the last two years when the I.T.U. has, for the first time, become interested in vacations, and whether that wasn't just to take care of the big offices, when there wasn't work, at a seasonal period, to go around?

A. It has only been in the last three or four years that we have been active in requesting vacations with pay. But many of them had been granted before these negotiations started.

Q. And in some of the bigger papers there had been a week's vacation granted?

A. There had been hundreds.

(Testimony of Seth R. Brown.)

Q. Yes. When you couldn't get together in your meeting of April 15, 1940, you, as I recall it, said that you would agree to arbitration. Is that correct? A. Yes, sir.

Q. At that time did you agree to arbitrate both the question of apprentices, or wages alone?

A. Well, are you familiar with arbitration?

Q. Somewhat.

A. Then, you must know that when the arbitration is agreed on, a code of procedure is set up as to what is going to be arbitrated and what is not arbitrated.

We didn't get that far.

Q. When you spoke to Mr. Hoiles, isn't it true you said: [132] We will negotiate the wages. And that you didn't offer as one of the matters subject to arbitration as to how far the paper could go in regard to apprentices?

A. That wasn't touched on at the time. I simply asked him if he would agree to submit the controversy to arbitration, and he sat there for a minute and was looking up at the ceiling, debating with himself evidently, and he said, "I will have to take a position that the Register will refuse to submit this case to a third party."

Q. I will ask you whether or not that didn't come after the conversation on the question of wages alone?

A. I couldn't say. It was during the conversation on various phases of the matter.

Q. Did you ever offer, I don't think I asked

(Testimony of Seth R. Brown.)

you this point blank before, did you ever offer to arbitrate the differences between you with respect to apprentices?

A. No. We never made that a specific reference. Of course, we couldn't arbitrate certain matters on apprentices. You know that fact. But I did agree to this: To go back to the local union here and recommend that the union submit the case to arbitration and define the arbitrative points.

Q. But when you offered arbitration to Mr. Hoiles in 1940, you didn't give him any hope that he also could have relief on the subject of apprentices?

A. Oh, no; of course not. [133]

Q. Now, then, when in 1941 you had the meeting, about April 18th, when you had the discussion about the increase of wages, didn't Mr. Hoiles say to you at that time: "Whatever increase in wages we grant as a result of this contract, I naturally, will have to pass on also to other employees in the plant"? Didn't he say that in substance?

A. I testified to that here; he did, yes.

Q. I thought the way you testified was a little bit different than that and I wanted to bring out exactly what he had stated.

Did Mr. Hoiles or Mr. Juillard or Mr. Hanna, in 1940, ever, any of them, indicate that by full control of apprentices, which is the language I believe you used and which is also, I believe, used in one of the letters, they meant more than that they wanted more apprentices, and they wanted the apprentices

(Testimony of Seth R. Brown.)

to be on the machines prior to the sixth year? Isn't that true?

Trial Examiner Moslow: Read the question.

(The question was read.)

The Witness: Well, are you referring to all three of them, Mr. Sargent?

Q. (By Mr. Sargent): I will ask you a preliminary question: Didn't Mr. Hoiles do practically all the talking on the negotiations?

A. Absolutely. [134]

Q. And Mr. Hanna in 1940 was there as more or less as an observer of the management, and the same is true of Mr. Juillard, in 1941?

A. I would say so, yes.

Q. Whenever Mr. Hoiles mentioned this clause of full control of apprentices, during the negotiations, wasn't he referring to the desire of the management to have more than three apprentices; and second, that the apprentices would be permitted by the union to be put on the machines prior to the sixth yaer? Isn't that true?

A. Do you want my interpretation of what he wanted?

Q. I ask you whether that isn't what he said in the negotiations?

A. No, I wouldn't say he did, specifically.

Q. Weren't there only two subjects discussed in regard to apprentices?

A. Yes. But his actual words, you know, I don't entirely agree with all of that. He expressed a desire to have the apprentices go on the machines

(Testimony of Seth R. Brown.)

previous to their last year, if that is an answer to your question.

Q. And he asked also to have more than three apprentices, didn't he?

A. I have answered that too. I say he wanted unlimited apprentices.

Q. I see. Well, at least the question of the number, and [135] the machines, working on them before the sixth year, were the two subjects in controversy, weren't they? A. Yes, sir.

Q. Now, did the management at any time, other than the slight question that arose as to that early hour of going to work in the morning, ever decline to abide by the contract in effect?

A. I think they had more or less contention out there between the chairman of the chapel and the foreman, but ultimately, after the matter was talked over, they complied with it all, yes.

Q. Isn't it true that this management had a good record of compliance with the so-called verbal agreement throughout its existence?

A. Up to a certain point.

Q. Apart from the negotiations, Mr. Brown, isn't it a fair statement that they did have a good record of compliance with the contract as it existed, apart from the negotiations?

A. I wouldn't want to say that. You are getting into a big subject there.

Q. Well, you yourself said that there was a very friendly relationship between the union and the paper, very cordial relationship between the union

(Testimony of Seth R. Brown.)

and the paper throughout that period, prior to the strike?

A. Not entirely up to the strike, but up to within the last [136] two years previous to the strike, after the suspension of the Journal here, if you want to know specifically.

Trial Examiner Moslow: You say up to the suspension of the Journal?

The Witness: Yes, sir.

Trial Examiner Moslow: What is that Journal?

The Witness: The Journal is their competitor here.

Q. (By Mr. Sargent): When was the Journal suspended, Mr. Brown?

A. Approximately, I think November, or December of 1938.

Q. And after that you say that the relations between the paper and the union were not very good?

A. To this extent: That the editor of the Register criticized the local typographical union very severely in his editorial columns, of the paper, from time to time, and by personal visitations to the composing room.

Q. And you didn't think thereafter 1938, that there were cordial relations between the union and the paper?

A. The union was attempting to abridge any ill feeling between the parties, but they had a difficult task to perform.

Trial Examiner Moslow: Off the record.

(Testimony of Seth R. Brown.)

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

I have been advised by the custodian of this building that we must be out of here each night by five o'clock, and [137] that we can't begin our hearings until 9:30 in the morning.

Until further notice we will observe those hours.

We will recess at this time until tomorrow morning at 9:30.

(Whereupon at 5:00 o'clock p.m., May 7, 1942, an adjournment was taken until 9:30 o'clock a.m., May 8, 1942.) [138]

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Council Chambers, City Hall,
Santa Ana, California,
Friday, May 8, 1942.

9:30 o'clock A. M. [139]

[139]

PROCEEDINGS

Trial Examiner Moslow: The hearing will come to order. Mr. Brown.

SETH R. BROWN,

resumed the stand as a witness for the National Labor Relations Board, having been previously duly sworn, and testified further as follows:

Cross Examination (Continued)

Q. (By Mr. Sargent): So it was your idea, Mr.

(Testimony of Seth R. Brown.)

Brown, that after 1938 the relations between the union and the paper were not cordial?

A. They had become strained to a certain extent.

Q. Did this extend up to the time of the strike?

A. More or less.

Q. I show you a copy of a letter under date of April 3, 1941 to Mr. C. H. Hoiles from the Typographical Union, signed by George W. Duke; the original, which is in my client's possession, will be here shortly. I ask you if you are familiar with that letter?

Mr. Ryan: What is the date of that letter, Mr. Sargent?

Mr. Sargent: April 3, 1941.

The Witness: Yes, sir.

Q. (By Mr. Sargent): You are aware that on April 3, 1941 Mr. Duke, president of the Santa Ana Typographical Union, No. 579, said: "The cordial relations existing between [141] yourself and the union men in your employ should give you great satisfaction in these days when there is so much strife between employers and employees. We trust that this feeling of partnership may continue and be strengthened."

Were you aware of that letter when you said, a minute ago, there were not cordial relations between the union and the paper?

A. Yes, I was aware of it.

Trial Examiner Moslow: May I see the letter?

(Testimony of Seth R. Brown.)

Mr. Sargent: When the original is here, Mr. Examiner, I shall put that in evidence.

Q. (By Mr. Sargent): I ask you whether or not you can remember at one of the negotiating meetings at which you were present, a dispute between yourself and Mr. Patison as to what apprentices should or should not be permitted to do.

A. I don't recall any dispute. We had a discussion in reference to it.

Q. At what meeting was that, do you remember?

A. Well, I think it was the April 3rd meeting, 1941.

Q. Will you tell us what you said and what Mr. Patison said?

A. Mr. Patison was the chairman of the office, that is, chairman of the men in the composing room.

Q. The chapel chairman?

A. The chapel chairman, and he made the statement that he [142] wasn't clear upon the provision of the laws as to whether boys could work on a machine previous to the sixth year.

And when he made that statement, I made no reply until Mr. Hoiles spoke up and said: "Well, what do you think about it?"

And I stated positively that the boy couldn't work on a machine until his sixth year.

Q. Didn't Mr. Patison take the position that there was nothing in the law which prevented a man from working on the machine before the sixth year?

A. Mr. Patison stated he might be in error in reference to his position.

(Testimony of Seth R. Brown.)

Q. Didn't he say that definitely?

A. Not to my knowledge. I don't recall he took that position, except he said he was under the impression they didn't prevent him from working on the machine, but he might be mistaken.

Q. He was a member of the negotiating committee on behalf of the union with you, wasn't he?

A. Yes.

Q. I don't think I asked you this yesterday: Is there any other provision in the constitution and by-laws of the I.T.U. which, in your opinion, prevents apprentices from working on machines prior to the sixth year, other than Section 17, that you read yesterday? [143]

A. I don't think there is any other section. There may be, but I am doubtful.

Q. You can't remember the section?

A. I don't recall at this time. I wouldn't say positively until I found the opportunity to look it up.

Q. Just before we closed yesterday you seemed to have some thought in mind that there might have been other things which the respondent did, or some things which the respondent did other than that dispute as the opening hours, which might have been in contravention of the existing verbal contract. Do you recall anything else which the paper did which might be deemed not to be living up to the contract? Prior to the strike, of course.

A. Well, you put your finger on one yesterday: In having a person not a member of a union working on a typesetting machine in the composing room.

(Testimony of Seth R. Brown.)

Q. But the union never objected to that. In fact, it was with the union's consent——

A. I think the union objected but didn't want to make an issue of it.

Q. Do you know of any objection by the union?

A. I have been told that. I don't know personally.

Q. You didn't make any objection, did you?

A. No, sir.

Q. No. Is there anything else which you can point your [144] finger to which, in your opinion, was something which the company had not lived up to, in the existing verbal agreement with the union?

A. There was that section that we referred to about the hours, and the one—one of the apprentices was put on a machine before his fifth year and a protest was made by the union officials, and I think he was taken off.

Q. At the time of that protest with regard to one of the apprentices who went on during his third or fourth year, I ask you whether or not the company didn't take the position, upon being shown your by-laws, that the section 17 merely provided that he should be put on during the sixth year, but there was no prohibition against his being put on before?

A. I couldn't answer that. You would have to ask an official of the local union.

Q. Have you had a chance to refresh your recollection, to know whether or not the company did agree to the change of the hours as the union asked?

(Testimony of Seth R. Brown.)

A. You mean from 6:30 to 7:00?

Q. Yes.

A. I don't think they agreed specifically. As I stated yesterday, Mr. Hoiles indicated that that wouldn't be a difficulty; that the reason for going to work early was no longer available, or necessary.

Q. I ask you whether you have sought to find out, since our [145] hearing yesterday, whether the company did or did not agree to that question.

A. Well, they didn't agree with me, if that's what you mean.

Q. You don't know whether the company agreed or not, do you? A. No, sir, I do not.

Q. All right. You testified that when you held your negotiations in 1940, I believe the last meeting was on May 16th, and that you couldn't agree, and therefore the union held the entire matter in abeyance until some time early in March of 1941—is that right? A. That is right.

Q. And during that time the existing verbal contract was adhered to by the company, was it not?

A. Yes, sir, I think it was.

Q. Had you seen this April 3, 1940 letter, to which I have called your attention a moment ago, prior to the time it was sent out by Mr. Duke to Mr. Hoiles? A. Prior to the time it was sent out?

Q. Yes. A. No, sir.

Q. When did this letter first come to your attention?

A. After it was sent to Mr. Hoiles I saw a copy of it.

(Testimony of Seth R. Brown.)

Q. During the time when you were negotiating on behalf of the union with the respondent, whenever you requested a meeting with Mr. Hoiles he met with you, did he not? [146]

A. Usually so, yes; sometimes they were delayed.

Q. If you happened to ask him for a date when it was difficult for him to meet, he would arrange another date, would he not?

A. Yes, we arranged eventually all of our meetings.

Q. Whether you went to him in negotiations or whether you went to him in private conversation, he was always available to you, even though there might be some slight delay. Isn't that true?

A. I say, we eventually did meet.

Q. Yes. That was true after the strike began as well as before, wasn't it?

A. I never had any personal contact with Mr. Hoiles after the strike except a telephone conversation.

Q. Yes. Did the I.T.U. laws, to which you referred yesterday, in effect April 30, 1941, did they at that time provide that before a strike could be taken it required a three-quarters vote of the membership of the union itself, or a three-quarters vote of the chapel affected? A. The union itself.

Q. In other words, it was possible, was it not, to have a three-quarters majority of the union in favor of a strike even though a number of the em-

(Testimony of Seth R. Brown.)

ployees on the particular paper might be opposed to it? A. Yes; it's a secret vote. [147]

Q. Well, it was true in this case that certain of the employees of the Register were not in favor of bringing this strike? Isn't that so?

A. Speaking for myself, right up to the hour of the strike I tried to arrange a settlement to avoid the strike being held, but I didn't get anywhere with the management in those efforts.

Q. Would you please answer my question, Mr. Brown? A. Will you repeat the question?

Mr. Sargent: I ask the last answer may go out as not responsive.

Trial Examiner Moslow: Motion granted.

Mr. Sargent: Read the question.

(The question was read.)

The Witness: I haven't any knowledge.

Mr. Ryan: I object to the line of questioning as immaterial and irrelevant and has no bearing on the issues in this case.

Trial Examiner Moslow: I will overrule the objection.

The Witness: I haven't any knowledge as to the feelings of any individual who voted on that strike sanction. I don't know to my personal knowledge how any man voted.

Q. (By Mr. Sargent): You know certain people didn't go out, do you not?

A. Yes, but I don't know how they voted. [148]

Q. You know that certain people went out and came back? A. I know one came back, yes.

(Testimony of Seth R. Brown.)

Q. And you know others wanted to come back, but the union persuaded them not to come back?

Mr. Ryan: I object——

Trial Examiner Moslow: Why is that relevant, Mr. Sargent?

Mr. Sargent: Because it indicates what the thought of a number of the employees was as to whether the company had been bargained with in good faith, and whether the union was justified in its action.

Trial Examiner Moslow: How do you derive that from the fact of whether an employee wants to go back to work or not?

Mr. Sargent: As you read the complaint, Mr. Examiner, you will find one of the charges, and the witness has already referred to it, was that there was no reinstatement. We propose to show that statement is not in itself unqualifiedly correct.

Trial Examiner Moslow: I will sustain the last objection.

Q. (By Mr. Sargent): It was possible, therefore, was it not, under the by-laws, for a strike vote to be taken where there was more than 25 per cent of the employees in the shop who had been unwilling to have the strike called?

A. I don't understand your question.

Mr. Ryan: I object to this——

Trial Examiner Moslow: I will sustain this; it is [149] repetitious. He has answered before.

Mr. Sargent: He hasn't answered that.

Trial Examiner Moslow: He has answered that

(Testimony of Seth R. Brown.)

a three-quarter vote refers to the entire vote, and not to the chapel.

Mr. Sargent: But one is a logical deduction from the other. But unless you have some particular objections, I would like to have the record show it was possible to have a strike vote where more than a quarter or possibly the majority of employees in question were opposed to the strike.

Trial Examiner Moslow: It seems to be pure mathematics to me. However, I will let you ask the question.

Mr. Sargent: Will you read that question, please?

(The question was read.)

The Witness: I don't know how many members of the union there were at that time.

Trial Examiner Moslow: Mr. Brown, is it mathematically possible for that situation to occur?

The Witness: I couldn't answer that. I don't know how many members would be affected on the outside of the office.

Q. (By Mr. Sargent): Approximately how many members of the union were there at the time of the strike?

A. I couldn't answer that question. You would have to ask——

Q. You had a lot of employees in other places?

A. We had some, yes, but the majority of them were in the Register. [150]

Trial Examiner Moslow: The majority of the local members belong to this chapel?

(Testimony of Seth R. Brown.)

The Witness: Yes, sir.

Q. (By Mr. Sargent): Approximately how many print shops had members in the jurisdiction of this local?

A. I couldn't give you the exact number. We have an official of the union that can give you all that information.

Trial Examiner Moslow: Are you going to call a representative of the union, Mr. Ryan?

Mr. Ryan: Yes, I am; the next witness.

Mr. Sargent: I would like to call the Examiner's attention to this fact: That he is a man that has spoken with all the authority of the union; who has been here over a period of months and who is supposed to know the whole situation. And whenever I ask an embarrassing question he says we will have to ask someone else, or "I don't know."

If he spoke with the authority which he pretended to have with respect to other subjects, it is rather strange that when I have a question which is embarrassing, he doesn't care to answer it.

The Witness: May I make a statement on it?

Trial Examiner Moslow: I do not consider counsel's statement as evidentiary, so I don't care to hear your reply.

Q. (By Mr. Sargent): Do you know, Mr. Brown, of certain employees who were returned to work after the strike? [151]

A. I know there was one journeyman returned to work a few days after the strike, yes.

Q. What is his name? A. Carl Thrasher.

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: How do you spell that?

The Witness: T-h-r-a-s-h-e-r.

Trial Examiner Moslow: Is there a higher rank than journeyman in this profession?

The Witness: No, they are all journeymen.

Q. (By Mr. Sargent): Do you know of anyone else, Mr. Brown, who was returned to work?

A. One of the apprentices went back after several weeks. I don't just know the name.

Q. Do you know his name?

A. I think it was Cecil Starnes, I believe.

Q. You said yesterday in answer to a question from Mr. Ryan, that the strike had been continuous ever since April 30, 1941. Did you mean that?

A. April 30, 1941?

Q. Yes. A. Yes.

Q. You said that a picket line had been maintained around the plant ever since that time. Did you mean that statement too?

A. So far as my knowledge goes, yes, sir. [152]

Q. Don't you know that there have been weeks and months when there hasn't been a picket outside the building on either side of the street?

A. No, sir; not to my knowledge.

Q. You have been told that?

A. No, sir. I have been down there several times. Every time I have visited there has been pickets there. I haven't supervised the whole procedure.

Q. Maybe they came out just to greet you.

A. Well, I am satisfied—at least they were all present when I came down there.

(Testimony of Seth R. Brown.)

Q. I see. Did you on behalf of the union, or did the union, to your knowledge, ever request the reinstatement of the striking employees at any other time than the letter which is now in evidence asking for a meeting? A. No, sir.

Trial Examiner Moslow: That is the letter received around July 29th, 1941?

The Witness: I think that is about the date; it's in July.

Q. (By Mr. Sargent): You were referring to the letter marked Board's Exhibit 7, which is in evidence, signed by Mr. Jones, president of the union, by Mr. Fisher, secretary, saying "The union requests a meeting with the Santa Ana Register Publishing Company for the purpose of renewing [153] negotiations and reaching an agreement for the reinstatement of the former union employees of The Santa Ana Daily Register." That is the letter referred to? A. Yes.

Q. And that is the only request, as far as you know, ever made for any reinstatement of employees? A. So far as I know.

Q. And you were also familiar, were you not, with Board's Exhibit 8 now in evidence, of the answer under date of August 2, 1941, by the Register Publishing Company to the union?

A. I saw a copy afterwards, a copy of this.

Q. And you wouldn't say from this letter that the company refused to confer with the union, would you?

(Testimony of Seth R. Brown.)

A. They didn't refuse to confer, no. They set forth their position as not changed.

Q. Well, the position of the management, you say, had not changed. That isn't what the letter says, with respect to the necessity of having added new employees; you don't mean to say there was no change there, do you?

A. This is what I refer to: "On behalf of the management I also feel it necessary to indicate to you that there has been no change in our situation since the union and the management found it impossible to get together on the questions of increased wages and apprentices."

That is what I referred to. [154]

Q. On the question of reinstatement you weren't attempting to indicate the management's position hadn't changed, so far as reinstatement of employees was concerned?

A. No, it was on the question of apprentices, which broke off negotiations.

Q. Did you know, Mr. Brown, that prior to the employment by the company of certain of the people who were employed after the strike, that the company sought to get back some of its former employees, before employing others? Did you know that?

A. Not to my knowledge. I haven't any knowledge of it.

Q. Had you been told that the company had asked one of its leaders, Mr. Duke, that they would be very glad to take back anybody who wanted to

(Testimony of Seth R. Brown.)

come back, that there was a necessity for having more employees and if they didn't come back, it would be necessary to replace them with others?

A. I heard general discussion, hearsay; I never was told that specifically.

Q. Mr. Duke never told you that?

A. No, sir.

Q. All you heard of it was a rumor. Is that right?

A. I heard it around, yes. I don't know when it occurred, or the details.

Q. You never suggested to the union that from the viewpoint of mutual advantage to both the employees, the union, and the [155] company, that there be an effort to see if those employees couldn't be gotten back to work before other employees were employed?

A. It isn't the policy of the Typographical Union——

Q. May I have an answer to the question?

A. I am trying to answer it.

Trial Examiner Moslow: Proceed.

The Witness: It isn't the policy of the Typographical Union to permit their members to go back individually, in a case of a strike of this character, and that is, as I understand it, what was proposed by Mr. Hoiles; informally, you understand.

Trial Examiner Moslow: What was proposed?

The Witness: That certain members that went out on strike would apply for their old jobs back.

(Testimony of Seth R. Brown.)

Q. (By Mr. Sargent): You don't know whether it was Mr. Hoiles or a representative of the management who told Mr. Duke about bringing them back generally, or whether it was just individually?

A. No, I don't; just as I told you, I got my information in general conversation in reference to it.

Q. Now, I come back to my original question. Did you, as the ranking member of the International Union, at any time make any move on behalf of the union and the striking employees to bring them together with the management for the [156] purpose of getting them back in their jobs prior to the letter of July 28th or 29th?

A. Well, we suggested arbitration.

Q. Wait a minute. I am talking now about the time between the date of the strike and the date of your letter, on July 28th or 29th.

A. That's what I refer to.

Q. Did you make any move to the management saying: Let's see if we can't bring these employees back into the plant?

A. I suggested this action by the union on July 29th.

Q. That's the only move which you suggested.

A. That's the last move, yes, outside of arbitration.

Trial Examiner Moslow: When you say you suggested the action of July 29th, you refer to the letter, Board's Exhibit 7?

The Witness: Yes, sir.

(Testimony of Seth R. Brown.)

Q. (By Mr. Sargent): I thought you said a moment ago you didn't know about the letter until after it was sent?

A. Not that letter. I am referring to the one in reference to—I refer to the letter where the union asked for the reinstatement of the members. This letter that was sent by Mr. Duke I hadn't any knowledge of.

Q. I see. Have you had occasion over the evening recess to ascertain whether or not Jane Hoiles' work on the machines was used as a part of the production of the paper? [157]

A. I am told that it was.

Trial Examiner Moslow: Is that the girl you say worked on the machine?

The Witness: Yes, sir.

Trial Examiner Moslow: These machines you refer to, are they linotype machines?

The Witness: Yes, sir; linotype, and I don't know whether they have an intertype or not; one is an intertype and the rest of them are linotypes.

Q. (By Mr. Sargent): Did you ever present, during the negotiations of 1940 or the negotiations of 1941, prior to the strike, a written contract to Mr. Hoiles?

A. I never did; the union, I think, originated it. They may have sent it, and I believe they did, which called forth a counter-proposition; but I never presented any agreement. I was brought in afterwards.

(Testimony of Seth R. Brown.)

Q. Was anything presented by the union to Mr. Hoiles in your presence during either 1940 or 1941?

A. No, not in my presence.

Q. On the night of the strike, on April 30, 1941, do you remember what notice was given to the management of the strike? The vote that had been taken?

A. The action of the local union was that the strike, if a scale was not agreed to by the management, that the strike would occur at 7:00 o'clock on the next morning, May 1st. [158]

Q. And at the same time was not the statement made to the management that the night shift would not come off? A. The regular night shift, yes.

Trial Examiner Moslow: Would it what?

Mr. Sargent: Would not go off on strike.

Q. (By Mr. Sargent): And that notice was given around 9:00 o'clock in the evening, was it?

A. I don't know what time it was, but that referred to the regular shift.

Q. And I ask you whether or not it isn't true that shortly after that the night shift did walk off?

Trial Examiner Moslow: Shortly after what?

Mr. Sargent: The night shift did walk off on that strike.

Trial Examiner Moslow: During this evening?

Mr. Sargent: This evening of April 30th.

The Witness: I can recite exactly what happened, if that is what you want.

Q. (By Mr. Sargent): Didn't the night shift go off that evening?

(Testimony of Seth R. Brown.)

A. After certain events happened, yes.

Q. Well, I have no desire to keep you from telling the situation. If you want to tell what happened, go ahead. It is all right, Mr. Brown.

A. Well, the president of the union, Mr. Duke, came up to my hotel. I don't know what time it was. I imagine it was [159] about 11:00 o'clock. It might have been half past ten; and he stated that the foreman of the composing room was calling up all the printers in town, getting them down there to work extra, in order to get the paper out for the next day, and he didn't think it was fair, inasmuch as the union had agreed that the regular shift would stay on until 7:00 o'clock in the morning; and he wanted by advice, and I instructed him to pull the men out, under those condition.

Q. When Mr. Duke had gone to Mr. Hoiles and said there was going to be a strike the following morning, but that the night shift would not walk out, he didn't make any condition to the fact that the nigth shift would stay on the job——

Trial Examiner Moslow: What is the relevancy of all this, Mr. Sargent?

Mr. Sargent: It is showing the picture, and exactly what happened.

Trial Examiner Moslow: Why is it relevant to any of the issues? These people had a right to go out without notice, if they wished.

Mr. Sargent: You are dealing here, Mr. Examiner, with a case which involves the good faith or the bad faith of both parties to this situation.

(Testimony of Seth R. Brown.)

Now, the union and the Board are treating as other than good faith certain actions of the management, and, therefore, in order to put you in a position to know the whole facts, [160] each of the facts, I am trying to make the pertinent facts apparent before you.

Now, this is treated by the union as an act in bad faith of the management; and I would like to indicate to you that there was no condition at all mentioned by the union at the time when the management was notified there was going to be a strike. The union made no mention at all of any condition that nobody else should be brought in to work in the place.

Trial Examiner Moslow: Continue.

Q. (By Mr. Sargent): Isn't it true, Mr. Brown, that Mr. Duke made no condition to the management that if the night shift would stay on that the management couldn't bring anybody else into the plant?

A. I don't know what his conversation was.

Q. You didn't instruct him to make any such——

A. I didn't discuss it before.

Q. And the men who were brought in were members of your union, were they not?

A. Yes; some of them had worked the day shift.

Q. But they were all on your lists of approved members, so that they were simply bringing in people as though they were for extra work. Isn't that true?

A. They were members of the union.

(Testimony of Seth R. Brown.)

Q. Do you know how many men were actually hired that night [161] by the paper as extra men?

A. No, I do not.

Q. Would you be surprised to learn there were two? A. I don't know that that is true.

Q. You said in your testimony, did you not, they hired all the extra printers in town?

A. They called them up. I don't know; maybe they didn't respond. I can imagine they wouldn't, under the circumstances.

Q. Well, you don't know whether it was two, or more, or less, do you? A. No, sir.

Q. Mr. Brown, if the company had met the demand of the union for increased wages in April of 1941, would there have been a strike?

A. I don't see any occasion for a strike, if they met the union conditions. We don't strike when we agree on union conditions.

Q. My question was: Had there been the granting of the increased wages by the management in April of 1941, would there have been a strike?

A. That's up to the organization, of course. But I see no occasion for a strike, if we could agree upon the wage question, and the other matters involved.

Q. In other words, the main question between the union and the company was the question of the scales. Is that right? [162]

A. Yes, up until the receipt of the communication in reference to complete control over apprentices.

(Testimony of Seth R. Brown.)

Q. In spite of the letter with respect to control over apprentices, the company did nothing with respect to apprentices other than to hold to its agreement with the union, prior to that time. Isn't that true? A. Yes.

Mr. Ryan: May I have the last question read?

(The question was read.)

Mr. Ryan: I object to the question. The evidence in the record is to the contrary.

Mr. Sargent: Oh, yes——

Trial Examiner Moslow: Just don't argue. The objection is overruled. When you say lived up to the agreement, you mean the oral agreement?

The Witness: The oral agreement, yes.

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record. Proceed.

Q. (By Mr. Sargent): In the event that some local makes a contract with an employer which is not entirely pursuant to the I.T.U. rules and regulations, as set down in its by-laws, the I.T.U. doesn't take away the charter of the local, does it?

A. It depends on how serious the offense is.

[163]

Q. Do you know of any occasion where it has jerked a charter, simply because the contract wasn't acceptable to the I.T.U.?

A. I know I can recall one charter that was lifted, in the city of St. Louis, years ago.

(Testimony of Seth R. Brown.)

Q. And there were some other circumstances in that St. Louis Charter, apart from the contract, weren't there? A. Sure.

Q. Yes. As a matter of fact, all that happens is that the I.T.U. sends back word that the contract cannot be approved, by it, and that the I.T.U. won't give protection either to the union or security to the employer for its enforcement. Isn't that true?

A. That is true to a certain extent, yes.

Q. So that there isn't the great, dire effect, which your testimony might have indicated yesterday, when a local makes a contract which is a little beyond the wishes of the International?

Mr. Ryan: I object to that. It implies that the question of apprentices was a little matter that the I.T.U. could have easily overlooked, and that isn't necessarily the fact, and our contention is to the contrary.

Trial Examiner Moslow: Read the question.

(The question was read.)

Trial Examiner Moslow: I will sustain the objection. [164]

Q. (By Mr. Sargent): Do the rules of the I.T.U. require the resetting of all type that the employer uses, in mat or plate form?

A. The reset proposition varies in different communities. Local advertising has to be reset.

Trial Examiner Moslow: Will you explain what you mean by that?

(Testimony of Seth R. Brown.)

The Witness: I mean any firm that's in a local field, the type of local advertising has to be reset within a certain number of days, which is usually incorporated in a contract.

Q. (By Trial Examiner Moslow): You mean if a local advertiser has his own mat or cut it has to be reset?

A. If he secures that mat from our newspaper or printing institution, it has to be reset within a certain number of days on record.

Q. What do you mean by reset?

A. Set up from the original; they get it in mat form, and that has to be reproduced as nearly like the original as possible, in the office.

Q. Which is the printing made from? The mat or the reset? A. It is made from the mat.

Q. What is the purpose of resetting?

A. That's a provision.

Q. That's a penalty for using mats? [165]

A. That is right, because of the fact that there might be a permanent headquarters set up where all advertising was set.

Q. It is a device to keep, or make work for the apprentices?

A. It's to make work. Naturally, they want to keep what they have got.

Q. (By Mr. Sargent): I wonder if you know of your own knowledge, Mr. Brown, whether there are ten commercial printing shops in Santa Ana? I am informed that is the number that are here. Does that bear out your information?

(Testimony of Seth R. Brown.)

A. I don't know. I couldn't say positively.

Q. Did you have anything to do with the negotiations leading to the new commercial plant contract? A. None whatever.

Q. The contract of 1941? A. No, sir.

Q. That didn't come under your supervision at all?

A. No, sir. I was not asked to come in.

Q. When a continued story is furnished in mat form to a paper, do the I.T.U. rules require that that be reset?

Trial Examiner Moslow: What is the relevancy of this, Mr. Sargent?

Mr. Sargent: Well, because—might I give you that after I get an answer, subject to its being stricken if it isn't applicable?

Trial Examiner Moslow: What difference does it make? [166] Suppose the answer is "yes". What difference does it make?

Mr. Sargent: I would like not to give the reason until I get the answer. Then I would be very happy to. You can strike if it isn't material.

Trial Examiner Moslow: Very well; you may answer, then I will decide whether it should be stricken or not.

The Witness: I don't know what the local contract provided for in reference to reproduction. You would have to produce the contract.

Q. (By Mr. Sargent): I asked you about the I.T. rules.

A. Well, you would have to get the contract

(Testimony of Seth R. Brown.)

itself, because there are too many variations in different contracts, as you well know, Mr. Sargent.

Q. What? A. You know that.

Q. Yes, I do, and that is why I am asking this question. The I.T. rules say they have to be reset?

A. Yes.

Q. But the local contracts frequently don't require them to be reset; isn't that true?

A. Certain national advertising and matters of that kind are eliminated, so far as reset is concerned, in a great number of contracts.

Q. I am talking about continued stories.

A. It may be, but the majority of them are reset. [167]

Q. Isn't it true, so far as you know, the union didn't require the Register to reset these continued stories? A. I am not familiar with it.

Trial Examiner Moslow: What do you mean by continued stories, Mr. Brown?

The Witness: I believe he means a serial story.

Trial Examiner Moslow: It is furnished in mat form?

The Witness: Yes, it is furnished in mat form. No, it may not be in mat form, no. It may be in copy. But it would be in mat form if it wasn't reproduced.

Q. (By Mr. Sargent) You are aware, are you not, that in many of the local contracts, in spite of the I.T.U. rules to the contrary, the local contracts do you not require the resetting of type by the publisher? Isn't that true?

(Testimony of Seth R. Brown.)

A. In isolated cases that may—the local union may enter into a contract that is in violation of the international law; but you, yourself, have expressed what the position of the International is, and when the contract is up for reconsideration those are questions that will have to be considered.

Q. And if this paper had entered into a contract with the local which the International didn't like because there was something as to the number of apprentices, or as to the apprentices being permitted to do certain things the I.T.U. didn't like, the only difficulty that occurred would have been that the I. T. U. wouldn't have approved the contract, [168] and wouldn't have enforced it against either the union or the party. Isn't that true?

A. No. I don't think that would be their action. I think the International would inquire why the provisions of the contract as originally submitted to the president of the International were not adhered to; because these contracts are all submitted to the International before they are submitted to the local paper.

Q. You said yesterday that on many occasions they were signed by the local before they were sent to the International.

A. You mean the settlement?

Q. Yes. In other words, the contract is often signed before it is sent on to the International?

A. No. You misinterpreted my position on it. Here's the setup on it. When a local union adopts a new scale that scale is submitted to the president

(Testimony of Seth R. Brown.)

of the international union to see if it complies with international law, but previously to it being submitted to the local publisher. And if the president of the International finds that it does comply with international law, he so states. If it does not, he points out in what manner it does not comply and requests the local union to make the necessary changes before it is submitted to the publisher.

Q. Well, you testified that there were many changes from the international laws in local contracts, and that in certain [169] cases the International didn't like the contract which the local and the publisher entered into. Isn't that true?

A. Yes, sir.

Q. And if this paper and your local here had entered into an agreement which provided for certain provisions as to the apprentices, which the International did not like, the contract would have stood, but the International would have expressed its disapproval of the terms?

A. I still maintain they might take stronger action than that with a local union that would be guilty of entering into a contract that would give complete control over the apprenticeship system.

Q. You have already testified they entered into two things with respect to apprentices, where the numbers were involved, and the question of being on the linotype machines before the sixth year, and I think you know that the paper had two less than the number of apprentices to which it was entitled already, under international law?

(Testimony of Seth R. Brown.)

A. I wouldn't agree with that.

Q. You said yesterday they had three by private agreement; whereas, they are entitled to five under international by-laws.

A. You made that statement. I don't think they were entitled to five.

Q. You said possibly five. Are you going to say now on the stand that the question of whether or not the apprentices [170] could go on the linotype machines before the sixth year was of such importance to the I.T.U. that it would have thrown out the contract, if it came before it?

A. I can't speak for the president of the International Typographical Union, what his action would be.

Q. There have been a great many more drastic changes than that, that have been approved by the International Union. Isn't that true?

Mr. Ryan: I object to the question——

Trial Examiner Moslow: I will sustain it. We will not go into collateral issues here.

Mr. Sargent: Remember, Mr. Examiner, this gentleman is an expert.

The Witness: You don't seem to think so.

Trial Examiner Moslow: We will not go into other local situations, and other variations. We have enough to do with this one. We can't go into collaterial issues here.

Mr. Sargent: This was one of a series of negotiations that broke down because of two questions. I am asking the precise question with regard to one

(Testimony of Seth R. Brown.)

of the two things where they didn't get together, and this witness is attempting to indicate, by testimony yesterday that this was such a serious matter that it would have flagrantly offended the I. T. U., and jeopardized this local, if one small variation were made. Yet, many instances could be shown of far greater [171] changes than this, where the International approved a contract and took no recalcitory action against the local.

Trial Examiner Moslow: My ruling will stand.

Mr. Ryan: Mr. Examiner, referring to the last statement of respondent's counsel, he said the negotiations broke down because of two differences between the union and the company——

Trial Examiner Moslow: Let me interrupt you. I don't take the statements of counsel as evidence of the facts at all.

Mr. Ryan: I am sure you wouldn't, but I am not so sure somebody else, reading the record, might not do so, and I wanted to protect myself.

Trial Examiner Moslow: Let us not have any further comment, Mr. Sargent. Let us proceed.

Mr. Sargent: May I make one remark: I don't like to have counsel state I am deliberately stating anything false with regard to the record.

Trial Examiner Moslow: No one charged you with that, sir. Let us proceed.

Q. (By Mr. Sargent) Mr. Brown, at the time when the management made a counter-proposal to which you have already testified, of a raise in gross pay of $2.50 a week, in return for which the printers would work two and one-half hours more per week,

(Testimony of Seth R. Brown.)

which is contained in the management's proposal, written proposal, in its letter of April 26th, Board's Exhibit [172] 5 in evidence, you stated that that had already been mentioned by Mr. Hoiles previously in a negotiation. What was the date at which that was discussed, if you can recall?

A. I think April 3, 1941.

Q. Now, at that time when you were having your discussion with Mr. Hoiles, did he tell you the reason for that proposal by the management?

A. No. He didn't want to raise the hourly wage.

Q. Did he say to you this, in substance, upon this negotiational conference: One, that national advertising was down, and that the question of revenue to meet increased wages was a difficult one for the management, but that if the printers would work two and one-half hours more per week, that they would receive an increase of $2.50 and the paper would receive certain additional work which would enable it operate more economically, and would somewhat make up to it for the increase in salary, did he say that?

A. I don't recall any such conversation.

Q. He didn't say anything like that?

A. I wouldn't say that he didn't; I don't recall it.

Q. I ask you whether he didn't say that if the employees worked two and one-half hours more, the management would receive something substantial in return for the increase in wages?

(Testimony of Seth R. Brown.)

A. No, I don't think any such statement was made. [173]

Q. Do you know at the time, that national advertising was dropping in this and other papers?

A. National advertising?

Mr. Ryan: I object to it. It assumes it was. It assumes a fact not in evidence.

Trial Examiner Moslow: I will sustain the objection.

Q. (By Mr. Sargent) Was there any discussion during any of these negotiations in 1941 about a drop in national advertising?

A. Oh, I think it was mentioned during the negotiations somewhere. I don't just recall.

Q. Didn't Mr. Hoiles tell you that there had been a material drop in national advertising with this paper, preceding the negotiations in 1941?

A. I think that question was in 1940, if I remember.

Q. Might it not have been in 1941?

A. Well, my remembrance is it was in 1940.

Q. Did Mr. Hoiles say to you in 1941 during one of the conferences, that the revenues of the paper were such that he didn't know where the additional funds would come from to pay increases in salary?

A. I believe he did make a statement along that line at one time, which called forth the suggestion on our part of what to do.

Q. Did you or Mr. Duke during the conferences of April 3rd, [174] say why you didn't want the

(Testimony of Seth R. Brown.)

employees in respondent's composing room to work the two and one-half hours more a week?

A. Well, I don't know exactly what we said. I know what our position is now, and what it evidently was at that time.

Q. I am asking you what either you or Mr. Duke or anybody representing the union said at that time.

A. We were opposed to lengthening of the hours and so recommended to the union. We took the matter back to the union. The union decided unanimously it was opposed to the lengthening of hours.

Q. Was that action taken on your recommendation?

A. We recommended that they not accept it.

Q. You also recommended it not be accepted?

A. Yes, sir.

Q. You are aware that in a great many similar contracts or agreements between locals and the I.T.U., and similar newspapers, that 40 hours is the number of hours worked per week in the composing room of those papers, are you not?

A. A great many of them have worked 40 hours, yes.

Mr. Sargent: That is all.

Trial Examiner Moslow: Mr. Sargent, you were going to introduce the letter of April 3rd.

Mr. Sargent: I am going to, but I thought I would ask Mr. Duke, in view of the fact he is to come on next. It was signed by Mr. Duke. [175]

Mr. Ryan: I will stipulate it was, and you may introduce it.

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: I would like to have it in now.

Mr. Sargent: I will now offer it to be marked for identification as Respondent's Exhibit No. 1.

(Thereupon the document referred to was marked as Respondent's Exhibit No. 1, for identification.)

Trial Examiner Moslow: There being no objection, Respondent's Exhibit 1 for identification will be received.

(Thereupon the document heretofore marked as Respondent's Exhibit No. 1 for identification, was received in evidence.)

RESPONDENT'S EXHIBIT No. 1

Member of
Southern California Typographical Conference

SANTA ANA TYPOGRAPHICAL UNION
Number 579

Santa Ana, California
(Union Label 2)
April 3, 1941

Mr. C. H. Hoiles
Santa Ana Register
Santa Ana, California

Dear Sir:

The Santa Ana Typographical Union wishes to enter into a contract with you for the period beginning May 1, 1941 and ending April 30, 1942, the

(Testimony of Seth R. Brown.)

Union to furnish all labor performed in the composing room of The Register.

As a result of advancing prices in all commodities because of the defense effort and the outlook for additional business in the city of Santa Ana, there is a need for an increase in the price per hour paid for journeymen printers in your employee.

As you doubtless already know, the Union has recently completed negotiations with the commercial shops in Santa Ana and southern Orange County for a new contract calling for a substantial increase in wages.

In our negotiations last year, no agreement was reached with you, and the scale of wages question was left "open" for further consideration at a later time. You will recall at that time our request was for one dollar and fifteen cents ($1.15) per hour, plus a two weeks' vacation with pay.

Now, more than ever before, there is need for the adjustment of wages, since your printers are now drawing less than other printers employed in the city.

We beg you to earnestly consider this matter and give it your favorable attention at our conference scheduled for Friday, April 4, at 2:45 p. m.

The cordial relations existing between yourself and the union men in your employ should give you great satisfaction in these days when there is so much strife between employers and employees. We

(Testimony of Seth R. Brown.)

trust that this feeling of partnership may continue and be *strenthened.*

SANTA ANA TYPOGRAPHICAL UNION NO. 579
GEORGE W. DUKE
President

cc/ret

Live each day so that you can look any man in the eye and say: "I buy under the union, label shop card and button!"

---

Trial Examiner Moslow: I asked you yesterday if you had a copy of the oral contract. Have you got that yet?

Mr. Sargent: We have been unable to find that and my client is trying to do that. It certainly will be here tomorrow and we will be in a position to say whether that is or is not a typical contract.

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record. Proceed.

Redirect Examination

By Mr. Ryan:

Q. Mr. Brown, when the union voted to strike you took no part in bringing any word to the company about that matter, did you?

(Testimony of Seth R. Brown.)

A. No, sir. [176]

Q. That was Mr. Duke who did that?

A. Yes, sir.

Q. You weren't with Mr. Duke, were you?

A. No, sir.

Mr. Ryan: I have no further questions.

Trial Examiner Moslow: Mr. Sargent?

(No response.)

Trial Examiner Moslow: Under this agreement, your oral contract, were the printers forbidden to work more than 37½ hours a week, or were they paid time and a half for overtime?

The Witness: They were paid time and a half for overtime.

Q. (By Trial Examiner Moslow) They were allowed to work as many hours as they wanted to?

A. Yes, sir.

Q. You often used the expression that the president of the I.T.U. underwrote the contract. What do you mean by that?

A. I mean that after the local parties, the company and the local union, agreed on a contract, the contract is sent to the president of the international, and he looks it over, and if it is in accord with international law, he underwrites it.

Q. What do you mean by underwrites?

A. He attaches his signature to it guaranteeing its fulfill- [177] ment.

Q. He guarantees to the employer the fulfillment of the contract? A. Yes, sir.

(Testimony of Seth R. Brown.)

Q. And is the underwriting of any value to the union itself?

A. Well, most of us think so. There is a difference of opinion on that sometimes. It is generally construed as being the proper procedure.

Q. Is the I.T.U. affiliated with the A. F. of L. now? A. Not at the present time.

Q. It is unaffiliated? A. Unaffiliated.

Q. This oral agreement that has been referred to, did you have anything to do with the negotiation of it? A. No, sir.

Q. Do you know what its term was?

A. The length?

Q. Yes.

A. It ran from March '37 to March of '39.

Q. Was it automatically renewed or re-negotiated?

A. I understand after slight negotiations it was renewed, or continued for a year.

Q. It was re-negotiated or automatically renewed?

A. I guess they didn't come to an agreement on the terms and finally it was allowed to continue. [178]

Q. For one year? A. For one year, yes.

Q. That would be until about March 1940?

A. Yes, sir.

Q. What happened at that time?

A. Well, they adopted a new scale.

Q. Was it renewed? A. It never was.

(Testimony of Seth R. Brown.)

Mr. Sargent: Was the answer to that, the contract was never renewed?

Trial Examiner Moslow: That is right.

Q. (By Trial Examiner Moslow) And in 1941 was it renewed?

A. '41? That was the date of the strike. They adopted a new scale, another new scale, in September '41.

Q. It is your position that the contract was not renewed in March, 1940, but that the employer and the union followed the same terms?

A. Yes. Mr. Examiner, yesterday I think I made the statement that it was continuous. It continued up to the time of the strike. I find, by looking at the contract last night, that it only continued for 60 days after the expiration of the agreement, so that under those provisions, it had expired, although it was mutually acceptable to both sides.

Q. You mean the actual working conditions remained the same? A. Yes, sir. [179]

Q. Even though the contract expired?

A. Yes, sir.

Q. Did this contract have a closed shop provision?

A. I think it has a provision in there that none but members of the union would be employed.

Q. Was that provision lived up to after March, 1940? Were any non-union members employed?

A. None, except this isolated case, which they spoke of, this young lady working in there. That is so far as my knowledge goes.

(Testimony of Seth R. Brown.)

Q. About how many employees were there in the composing room?

A. Twenty-two, I believe.

Q. How long has the apprenticeship system been in existence in the I.T.U. union?

A. It has been in existence since 1907. It was not until 1924 that the International Typographical Union established the board of education at its headquarters in Indianapolis, and adopted certain units to be furnished to any schools who would adopt the set of regulations. There was six units, with ten lessons in each unit.

Q. Do you know approximately, you say there were 1,000 locals of the I.T.U.?

A. About a thousand, yes.

Q. Do you know of any contract where the locals placed no restriction on the number of apprentices, or the kind of work [180] they did?

A. No, sir. I don't know of any such contract, of my own knowledge.

Mr. Sargent: Mr. Examiner, may I object to your question as not being based upon what the record shows in the case?

Trial Examiner Moslow: Yes. You have a perfect right to object, and I will consider your objections just as though the question were being asked by anyone else. But I would like to get the grounds of your objection. I asked whether he knew of any contracts.

Mr. Sargent: You asked whether he knew of any contract where there was no restrictions upon the

(Testimony of Seth R. Brown.)

number of apprentices. The reason for my objection is because that assumes that the position of the management was at all times that we would have unlimited——

Trial Examiner Moslow: There is no such assumption on my part.

Mr. Sargent: Very well. I will withdraw my objection.

Q. (By Trial Examiner Moslow): You mentioned something about conciliation during this strike. Will you tell me something more about that?

A. Well, these meetings we have held, I don't know how many there are, but in the aggregate, all these meetings were conciliation meetings.

Q. After the strike? [181]

A. Oh, you mean subsequent to the strike. No, there was no meetings held except through official communication.

Q. You testified you spoke to Mr. Hoiles over the telephone in May, 1941, and you referred to a Conciliator in the Department of Labor?

A. Yes, sir.

Q. Had there been meetings after the strike with a Conciliator? A. Not mutual meetings.

Q. Separate meetings?

A. The union had requested the Director of the Conciliation Division of the Department of Labor to assign a Commissioner to investigate the circumstances of the controversy here.

Q. Was a Conciliator assigned?

(Testimony of Seth R. Brown.)

A. Yes, sir.

Q. What is his name?

A. Mr. E. H. Fitzgerald, of the Los Angeles office.

Q. You never met with the management and Mr. Fitzgerald? A. Not together.

Q. But you did meet with Mr. Fitzgerald?

A. Yes, sir.

Q. You testified that the Conciliator proposed that both sides submit the matter to arbitrators and the union agreed, and that the Conciliator asked Mr. Hoiles to do likewise. How do you know that?

[182]

A. He informed me of that.

Q. After you had this conversation with Mr. Hoiles on the telephone, you said it was your position or your contention that he was refusing to arbitrate. Did you hear from Mr. Hoiles thereafter on that question? A. No, sir.

Mr. Sargent: Mr. Examiner, do I understand that you are assuming that his testimony was that Mr. Hoiles refused to negotiate?

Trial Examiner Moslow: No, that's what he testified. That he told Mr. Hoiles; that Mr. Hoiles was refusing to arbitrate.

Mr. Sargent: I thought you said "negotiate". Arbitrate. Excuse me.

Q. (By Trial Examiner Moslow) Was this so-called sixth year rule included in the oral contract? A. Yes, sir.

(Testimony of Seth R. Brown.)

Mr. Sargent: What was the last part of that question, please?

Trial Examiner Moslow: Included in the oral contract.

Q. (By Trial Examiner Moslow) Had it been included ever since you first started your oral contract? A. So far as my knowledge goes.

Q. Did Mr. Hoiles ever explain to you how he wanted to modify or change or re-negotiate these apprenticeship rules? [183]

A. He wanted to put apprentices on the machines.

Q. Did he ever tell you why?

A. He thought we were exploiting the apprentices and making them serve too long a time in different departments, and he thought they ought to be put on the machines whenever he wanted them on there, without getting the rudiments of the trade first.

Q. What is the rate of pay of apprentices?

A. In the second year I think they started at 40 per cent of the journeyman's scale.

Q. They start at 40 per cent and gradually work up to 100 per cent?

A. Work up to about 85 or 90, in the sixth year.

Q. After that they get the full journeyman's scale?

A. When they become members of the union they get the full journeyman's scale. In the first year they are under the supervision of the office as to wages.

(Testimony of Seth R. Brown.)

Q. You mean the first year there is no restriction?

A. That is right. They are not apprentices until the beginning of the second year. That is, they are not apprentice members of the union until their second year.

Q. Did your local have any unemployed members in Santa Ana? A. Oh, yes, they had some.

Q. How many?

A. I couldn't say the exact number. It is not a large [184] local; probably not many.

Q. About how many members does the local have, approximately?

A. I woudn't want to say exactly.

Q. Give us your rough estimate.

A. I would say about 40. It fluctuates, you know, from time to time.

Trial Examiner Moslow: Anything further of the witness?

Mr. Ryan: Nothing.

Mr. Sargent: Yes.

Recross Examination

Q. (By Mr. Sargent) Did you mean to indicate, Mr. Brown, to the Examiner, that over time under the verbal contract began after 37½ hours?

A. It begins after the seven and one-half hours a day, not after 37½ hours.

Q. How many days was that?

A. Beg pardon?

Q. How many days was that per week?

A. How many days?

(Testimony of Seth R. Brown.)

Q. Yes. A. Five days.

Trial Examiner Moslow: So that a person might still earn overtime even though he didn't work 37½ hours a week?

The Witness: Yes, sir.

Q. (By Mr. Sargent) How many hours a week would a person [185] under the verbal contract have to work before he got paid overtime?

A. Seven and one-half hours a day, any particular day.

Q. I ask you whether or not under that verbal contract a person didn't have to work 40 hours per week before he was paid overtime during the week?

A. No, sir, I think not.

Q. Are you sure about that?

A. I never saw one contract that provided that. The contract itself would be the best evidence of it.

Q. As a matter of fact, you don't know what the clause was in regard to overtime in that verbal contract, whether it was 37½ or 40 hours a week, do you?

A. As I say, it is right there. You can look at it. I am satisfied, if you want a direct answer, that it provided that overtime would commence after seven and one-half hours of work. That's the usual provision in contracts, union contracts. It is different than the Federal statutes in reference to the matter.

Q. You are taking that from your general knowledge of the situation rather than this particular contract, aren't you?

Trial Examiner Moslow: Mr. Sargent, we can

(Testimony of Seth R. Brown.)

certainly establish what the facts are. I certainly will take the contract rather than this man's testimony as to its provisions.

Mr. Sargent: All right. [186]

Q. (By Mr. Sargent) Do I understand you, Mr. Brown, to indicate in response to the Examiner's question, that the verbal contract was only in effect for some 60 days after March, 1940?

A. I would—that's what the provision in the contract provides for, that I looked at last night; 60 days after the expiration of the agreement.

Q. Is it your position that thereafter that 60 days, ending May 1, 1940, that the company could have employed as many apprentices as it wanted to without violating the contract?

A. If they had, they would have raised an issue.

Q. Was the company, in your opinion, bound by the contract after May 1, 1940, or not?

A. That depends on the way you want to look at it. I would say they were morally bound, if they wanted to continue to accept the conditions. Both sides eventually agreed to that.

Q. As a matter of fact, the company did abide by the contract?

A. It did under certain conditions; they didn't entirely.

Q. They didn't raise the number of apprentices beyond three? A. No.

Q. It lived up to the conditions of the closed shop, and other conditions?

A. Except what has been brought out here with

(Testimony of Seth R. Brown.)

reference to [187] someone operating there that was not a member of the union.

Q. See if I understood you properly in answering another question of the Examiner's. Did you mean to indicate in answer to a question of his, that you knew of a number of cases where the local contract gave, or gives the employer greater discretion than under the I.T.U. rules, with respect to apprentices?

A. I wouldn't say there was such a contract. I am—the contracts are not available to me.

Q. You didn't mean to indicate——

A. We have got 10,000 of them.

Q. You didn't mean to indicate to the Examiner, then, that there were no contracts——

A. I don't think I so stated.

Q. I wanted to be sure.

A. I don't recall I did.

Trial Examiner Moslow: Your answer is now that you don't know of any?

The Witness: Yes, sir.

Q. (By Mr. Sargent) Did you say yesterday how wide your territory was, as a representative of the International?

A. Yes; Southern California, Arizona, and parts of Nevada.

Q. You don't have New Mexico under your direction? A. New Mexico?

Q. Yes. [188]

A. Well, it is part of my territory, but I never

(Testimony of Seth R. Brown.)

have been down there. They have very little difficulties, down there, apparently.

Q. Any contract that is executed by a local within your territory, if there is anything unusual about it, it would come under your jurisdiction?

A. If it was referred to me it would, yes. But I have never had a contract submitted from New Mexico to me.

Q. Would it be referred to you by the local or the International?

A. It wouldn't be referred to me unless I was assigned on a specific case.

Q. By the international?

A. By the international.

Q. And if something unusual would arise in some place throughout your territory, and a contract was entered into or was negotiated which was unusual, the International would assign you to that particular place?

A. Yes, sir; if the local union requested the services of a representative.

Q. Well, if the International thought something was being done in any place which was hostile to its best interests, it would send you down, would it not?

A. Yes, sir.

Mr. Sargent: That is all. [189]

Q. (By Trial Examiner Moslow) Just one second. About how many locals are there in this territory which you cover? Approximately?

A. There's about 20 in Southern California, and

(Testimony of Seth R. Brown.)

seven or eight in Arizona, and I don't think over five or six in New Mexico, as I recall.

Q. Is it a custom of the I.T.U. to have oral contracts?

A. That is not the custom. It is not the prevailing custom. They have them in some instances. Most of the contracts are signed contracts.

Trial Examiner Moslow: You are excused.

Mr. Ryan: Wait a minute.

Trial Examiner Moslow: I am sorry.

Redirect Examination

Q. (By Mr. Ryan) Mr. Brown, have you had experience respecting the International Typographical Union in areas other than the ones you have just mentioned? A. Yes, sir.

Q. When and where?

A. When I was vice-president of the International Typographical Union, between 1924 to 1928.

Q. Where were your headquarters then?

A. In Indianapolis, Indiana.

Q. What territory did you cover representing the union?

A. As vice-president I was under the jurisdiction of the [190] president, who would assign me to represent him at most any place in the jurisdiction of the United States or Canada.

Q. And while you were acting in that capacity did you have occasion to travel widely?

A. Very much so.

Q. Pursuant to your duties? A. Yes, sir.

Mr. Ryan: No further questions.

(Testimony of Seth R. Brown.)

Trial Examiner Moslow: You are excused.

(Witness excused.)

Trial Examiner Moslow: I believe, Mr. Sargent, you asked me some question about an assumption about the company's position. I stated there was no such assumption. I think I should state that my questioning doesn't entail such an assumption. I will, of course, come to no conclusion as to the company's views until I have heard the company's testimony.

We will recess for five minutes.

(A short recess was taken)

Trial Examiner Moslow: The hearing will come to order.

Mr. Ryan: Mr. Duke, please come to the witness stand.

No. 10364

# United States
# Circuit Court of Appeals

For the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

REGISTER PUBLISHING CO., Ltd., a corporation,

Respondent.

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# Transcript of Record

## In Two Volumes

## VOLUME II

## Pages 339 to 626

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Upon Petition for Enforcement of an Order of the National Labor Relations Board

FILED
APR 1 - 1943
PAUL P. O'BRIEN,
CLERK

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO 60-3-26-43

No. 10364

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**Upon Petition for Enforcement of an Order of the National Labor Relations Board**

ROTARY COLORPRINT. 590 FOLSOM ST.. SAN FRANCISCO 60-3-26-48

GEORGE WILLIAM DUKE,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ryan) State your full name, please. [191]

A. George William Duke.

Q. And your address?

A. 306 South Parton Street, Santa Ana.

Q. What is your occupation, Mr. Duke?

A. I am at present employed as advertising manager of the Burns, Cuboid Company, 414 East Fourth Street, Santa Ana.

Q. What is the nature of your business?

A. Manufacturers of foot appliances.

Q. Were you ever employed by the Register Publishing Company in its publication of the Santa Ana Register? A. Yes, sir.

Q. How long were you employed by that company? A. Approximately 18 years.

Q. Do you mean by that that you were employed on the newspaper itself for 18 years, or that you were employed by the company, the Register Publishing Company, Ltd., for 18 years?

A. I was employed by the Register Publishing Company for 18 years and worked in their newspaper composing room during that time.

Q. When you first began working on the Santa

(Testimony of George William Duke.)

Ana Register, was it owned by the same people that now own the paper? A. No, sir.

Q. Who owned it when you began working?

A. Mr. J. P. Baumgartner.

Q. And how long did you continue to work under his ownership [192] of the paper?

A. From about 1922 to 1928.

Q. And did the ownership change hands at that time?

A. Yes. He sold it to J. Frank Burke.

Q. And did you continue to work on the paper under the ownership of J. Frank Burke?

A. Yes.

Q. How long did you work under his ownership of the paper? A. From 1928 to 1935.

Q. And did the paper change ownership at that time?

A. Yes. Mr. Burke sold the Register to Mr. R. C. Hoiles and his associates.

Q. And did you continue to work on the Register paper under the ownership of the Hoiles?

A. Yes.

Q. And how long did you continue to work after the Hoiles became owners of the paper?

A. From 1935 to 1941.

Q. What time in 1941? A. April 30, 1941.

Q. When you worked on the paper under the ownership of Mr. Baumgartner did the Santa Ana Typographical Union have a contract with him covering the composing room employees?

A. Yes, it did.

(Testimony of George William Duke.)

Q. Were you a member of the Typographical Union at that time? [193] A. Yes.

Q. Are you familiar with the terms of those contracts with respect to their requirement as to the training of apprentices? A. Yes.

Q. Under the contracts with Mr. Baumgartner did the union have anything to do with the training of apprentices in the shop?

A. The union had full control of the training of apprentices, beginning with their second year, when they were obligated as apprentice members.

Q. Can you give us an outline of the steps of training of apprentices in the composing room of the Register Publishing Company, under the system provided for by the contracts which were in existence between the owner and the Santa Ana Union?

Mr. Sargent: Certainly there is no objection, except that if it has to do with contracts previous to the present ownership it is remote. You mean the present ownership, Mr. Ryan?

Mr. Ryan: No. I am starting back, Mr. Sargent.

Trial Examiner Moslow: I will overrule the objection. Specify if there was a change in the rules under Mr. Baumgartner, and under Mr. Burke, and under Mr. Hoiles, and indicate which one you are referring to.

The Witness: May I have that questiou read, please?

(The question was read.) [194]

(Testimony of George William Duke.)

Mr. Sargent: Just a minute. I meant on the Santa Ana Register newspaper, between the owner and the union, back when Mr. Baumgartner owned it. It was not the Register Publishing Company, Ltd., as I understand it, then.

The Witness: It may not have been.

Q. (By Mr. Ryan) But it was under the Santa Ana Register, the same being owned now by the Register Publishing Company?

A. Yes. Under Mr. Baumgartner the union had full control of the training of apprentices, and those steps were that the office, represented by a foreman of the composing room, would hire a boy who appeared to have qualifications to learn the printing trade. Any time during the first year of his apprenticeship, or his service to the company, the office had full rights and privileges to discharge him if he did not show aptitude in learning the trade. Beginning the second year he took obligation binding him to the union, and that began his apprenticeship and his training in the union. At that time he would be advanced from possibly the galley dump, as we call it, where the machine operators would take their matter that had been produced by them, and deposit it on the galley dump; then this apprentice would take a proof of it, the proof reader would read it, and then he would correct that, and deliver it to the make-up man.

Q. What do you mean "make-up man"?

A. The make-up men are those who take corrected composition [195] that has been produced

(Testimony of George William Duke.)

by linotype operators and place it, together with advertising, in the various pages. This usually was the next step of learning.

Q. When did he arrive at the point where he would be put on that sort of work?

A. He should have been, or usually in most shops today, they begin that training about the third year, and for six months of the year he learns the make-up trade.

This procedure varies, but speaking for the Register, he would be taught the composition of advertisements, what the meaning of lay-out is, the balancing of certain heavy portions in the ad against certain other heavy portions, being sure there was white space around certain portions of the type, so that it would be readable; he was taught all those things.

Then, he was taught operation of the various mechanical operations of the machines; he would be taught the operation of the Ludlow, which sets large type, and he was permitted to learn its operation under the supervision of the foreman, and usually the man who was in the so-called ad alley, is where we call the place where they composed advertisements.

After this time, usually the beginning of about his fifth year in those days, his apprenticeship was complete, after five years of instruction. The sixth year was added some time later. In his fifth year, then, he was allowed to complete [196] his instuction, by learning to operate the linotype machine. This

(Testimony of George William Duke.)

made a journeyman printer out of him. He could go any place in the United States, or wherever there were print shops, and submit himself for work as an accomplished printer. He would have a rating of combination man, the most valuable type of man that a foreman of a composing room seeks to employ, because he can be employed at anything by the owner of the paper, the office, as we term it.

Q. Explain the term "combination man".

A. A combination man is a man who can work on the machines, on the floor and on the make-up. He can markup ads, and do anything in the print shop necessary to the production of the newspaper, with the possible exception of being a machinist, which is a special trade in itself.

This complete training of the apprentice was always to the advantage of the office, as I was about to say, because the office could hire a man for a half day's work on the machine, and a half day's work in the ad alley to the advantage of the office without having to hire two men for that work. That's how a combination man is valuable.

Q. Do you mean that a combination man would be proficient in all the various things? Capable of being interchanged on various jobs?

A. That is correct.

Q. Was that procedure carried out continuously, in the [197] training of apprentices, while you worked under Mr. Baumgartner's ownership of the paper? A. Yes, sir.

(Testimony of George William Duke.)

Q. When Mr. Burke took over the ownership of the paper in 1928, I believe you said——

A. Yes.

Q. ——was that same system of training of apprentices continued under his ownership?

A. It was continued.

Trial Examiner Moslow: Did Mr. Burke go into a sixth year?

The Witness: I don't know exactly what time, I think that took place around 1937 or 1936. Is that correct?

Mr. Brown: 1936 or 1937, yes.

The Witness: I don't know exactly.

Q. (By Mr. Ryan) Aside from the fact that an extra year was added to the training of apprentices some time back six or seven years ago, was any other change in the system of training of apprentices in the composing room of the Santa Ana Register?

A. No changes were made under Mr. Burke.

Q. Did the supervision of the training of the apprentices fall upon the union exclusively, or was it a mutual arrangement shared by the representatives of the company and of the union in the composing room, to see that the apprentice got [198] full training to which he was entitled, to learn the trade?

A. I don't recall that the owner of the paper ever suggested any training for the apprentices. That was all taken care of by the boys in the shop. They would supervise—as he would go from department

(Testimony of George William Duke.)

to department, they would supervise his training in their own departments.

Q. When the present owner took over the ownership of the Santa Ana Register newspaper did the system of training of apprentices continue?

A. The system continued, yes.

Q. Did you have contractual relations between the Santa Ana Union and Mr. Burke while he was owner of the paper? A. Yes, we did.

Q. And did contractual relations continue to exist between the Register Publishing Company and the Santa Ana Union? A. Yes.

Q. Were you a representative of the union in any negotiating capacity when the contract was negotiated between the union and the company, the Register Publishing Company, in 1937?

A. Yes. I was present at all negotiations.

Q. You were. Will you tell us what occurred at the negotiations which occurred with respect to entering into the contract of 1937?

A. In 1937——

Mr. Sargent: I think it is pretty remote. I have no [199] objection to any testimony he can give, except there has been recognition there was a contract, and negotiations can't possibly have any bearing unless there was something in it that is important.

Trial Examiner Moslow: Can you make your question more precise, Mr. Ryan?

Q. (By Mr. Ryan) When the contract was negotiated between the Santa Ana Union and the

(Testimony of George William Duke.)

Register Publishing Company in 1937, were the negotiations conducted just between the union and the Santa Ana Register Publishing Company individually, or were other companies joined in the negotiations, and was a contract negotiated with a group of employers rather than just one company?

A. It was negotiated with a group of employers, composed of the Santa Ana Register and the Santa Ana Journal.

Q. Will you explain what the Santa Ana Journal Company was?

A. A newspaper operating in Santa Ana.

Q. A daily newspaper?

A. A daily newspaper being published in Santa Ana, and also, the various commercial shops were represented at all of these conferences.

Q. Did the union and these publishers and printing companies arrive at a contract, the terms of the contract being with all of them? [200]

A. Yes, with all of them collectively.

Q. And for how long did the contract continue?

A. It continued for two years.

Q. When did it terminate?

A. A graduated scale was provided. The wage rate at that time was 87½ cents an hour; at the beginning of the agreement the wage rate was to be 90 cents; for six months, 92½ cents; for another six months 95 cents an hour; for the remaining year of the two-year period $1.00 an hour.

Trial Examiner Moslow: Prior to negotiations the rate was 87½ cents an hour?

(Testimony of George William Duke.)

The Witness: Yes. May I add one thing to that?

Mr. Ryan: Yes.

The Witness: Concerning these negotiations, we asked that these agreements which we had entered into be reduced to writing, and that a signed agreement be made, but we were not given a signed agreement at that time. We asked for it; in fact, during all the negotiations I have ever had with owners of the Register Publishing Company I have asked at various times for a signed agreement.

Mr. Sargent: Please, wait. I am asking for an objection. He has said there were a lot of people, a number of employers. And I object on behalf of respondent to being made the recipient of what did or didn't take place with respect to negotiations with a lot of employers. [201]

Trial Examiner Moslow: That objection is overruled. Proceed. Were the terms reduced to writing?

The Witness: I am not sure.

Trial Examiner Moslow: Was a memorial of the terms of the contract made?

The Witness: Yes.

Q. (By Mr. Ryan) When you negotiated the contract in 1937 with this group of employers of which the Register Publishing Company was one party, you say you requested that the contract be reduced to writing and signed by the parties. Was the refusal to sign the contract made by all of the companies or just by the Register Publishing Company?

Mr. Sargent: Before you answer, I object on

(Testimony of George William Duke.)

the ground it is remote, and not applicable to these processes. There has been no charge here on the part of the Board that there was an unfair labor practice committed prior to 1940, and what took place at that time has no bearing on the present.

Trial Examiner Moslow: Objection overruled.

The Witness: All of the commercial shops agreed to sign the contract, and did so sign the contract. The Register Publishing Company did not sign, refused to sign. I do not recall exactly whether the Santa Ana Journal refused to sign, or did not sign because the Register did not sign.

Q. (By Mr. Ryan) The contract, by its provisions, ran until March, 1939; is that right? [202]

A. I think so.

Q. Yes. Was it renewed to continue another year?

A. Yes, there was a brief negotiation, during which time no change in the contract was made, though requested. I believe at that time, although I was not present, I believe a request was made that a contract be signed and continue for another year.

Trial Examiner Moslow: I will strike on my own motion with reference to his beliefs.

Mr. Sargent: May I ask at this time whether or not this witness was present during the negotiations in 1937?

The Witness: I have already so stated.

Trial Examiner Moslow: You were not present in 1939?

The Witness: No, sir.

(Testimony of George William Duke.)

Trial Examiner Moslow: Do you know whether negotiations were with the entire group of employers?

The Witness: In 1939?

Trial Examiner Moslow: Yes.

The Witness: No; just with the Register, at that time.

Q. (By Mr. Ryan) Do you know of your own knowledge whether or not the contract was continued for another year, from March 1939 to March 1940?

A. Yes, because I was present at the union meeting at which we agreed to continue for another year, by action of the membership. [203]

Q. Now, in March 1940, what was your position with the Santa Ana Union?

A. March, 1940?

Q. Yes.

A. I think I was vice-president. An election takes place in May and I was elected president at that time.

Q. But in March, you were vice-president. Is that right?

A. As I recall, that is true.

Q. Did you take part in any negotiations between the Santa Ana Union and the Register Publishing Company in March, 1940? A. Yes.

Q. Will you explain the inception of those bargaining negotiations, and what part you played in them?

A. One conference was held between Mr. Fisher

(Testimony of George William Duke.)

and Mr. Taylor, representing the union, a brief conference wherein they attempted to set a date for our first negotiation, and a date was set, early in March, 1940. I was present at those first negotiations in 1940.

Q. At that first meeting. Do you remember the exact date?

A. No, except that it was early in March.

Q. It would be about the first week in March?

A. Yes.

Q. Where was the meeting held, Mr. Duke?

A. Held in the office of Mr. C. H. Hoiles.

Q. Who was present on behalf of the union? [204]

A. Mr. Taylor, Mr. Fisher—no, not Mr. Fisher. I was present, Mr. Taylor was present. I do not recall whether Mr. Brown was present at that meeting or not.

Q. Who was present on behalf of the company?

A. Mr. C. H. Hoiles and Mr. E. J. Hanna.

Q. Had the union previous to this first meeting submitted any proposal to the company respecting wages, hours, or other working conditions for consideration?

A. I think—in fact, I am sure when Mr. Fisher approached Mr. Hoiles, that the price that we were going to ask for was mentioned?

Q. And what was the wage scale that you proposed to bargain for?

A. We proposed to bargain for $1.15 an hour and a week's vacation with pay.

(Testimony of George William Duke.)

Q. Yes. In this first meeting which you have just referred to, did you discuss those two proposals? A. Yes.

Q. The vacations and the wages?

A. Yes. We discussed them.

Q. Did you arrive at any agreement with the representative of the company on those two issues?

A. No. They refused to consider a wage increase.

Q. Did he make any statements——

Mr. Sargent: I object to the conclusion. I do not [205] object to what was said by Mr. Hoiles; but I ask that "they refused to consider" may go out.

Trial Examiner Moslow: I will grant that. Give us the substance of what Mr. Hoiles said.

The Witness: The substance was that he would not grant us the amount that we had asked for.

Trial Examiner Moslow: Continue.

Q. (By Mr. Ryan): With respect to vacations, what was his statement?

A. That due to the fact that he had to pay time and a half for overtime for union members, that it was not his policy to give vacations to them.

Q. Did you make any demands upon the company, other than those two, one with respect to wages, and the other with respect to vacations at this first meeting? A. I do not recall any.

Q. Did you make any request upon the representatives of the company to submit counter-proposals to your proposal? A. Yes, we did that.

(Testimony of George William Duke.)

Q. And were counter-proposals submitted by the company to the union subsequent to that meeting?

A. Yes.

Q. Do you recall what those proposals to the company were, that were submitted to the union?

A. There were several. They consist of a request that no [206] discrimination be made between the union and non-union employees; that the office be given the right to hire any man for less than a full day's work; that the office be given full control——

Mr. Sargent: Go a little slower, will you, Mr. Duke, please. Less than a full day's work?

The Witness: Yes. That the office be given full control over apprentices, both as time of their apprenticeship and the work they were doing during the apprenticeship.

Q. (By Mr. Ryan): Was there anything about the number of apprentices?

A. Yes, as to the number, those were—the office wished to have full control over the apprentices both as to the number and as to the work they were doing during their apprenticeship.

Also, there were three or four more requests.

Q. Was there anything with respect to the number of hours worked in one day, and the number of days in the week?

A. Yes. I believe they wished to make a work week which would consist of 40 hours, divided into five days of seven hours and one day of five hours.

Q. Was there anything with respect to pay for

(Testimony of George William Duke.)

straight matter operators, according to their term of——

A. Yes. Straight matter operators, so-called, would be paid 75 cents an hour under this proposal [207]

Q. Is there any other provision you can remember, or proposal, with respect to the time that the work was to start in the morning and cease in the evening? A. I don't recall that.

Q. Do you recall, does this refresh your memory, that they proposed that the work day start at 6:00 A. M. and end at 6:00 P. M.?

A. Yes, I do recall that that proposition was made. I do not recall it was made at that particular time.

Q. Did you discuss the company's proposals at the—after attending this first meeting, about the first week in March, did you subsequently attend any other meetings?

A. Yes. I attended a meeting held April 15.

Q. Where was that meeting? And who attended on behalf of the union and the company?

A. Mr. Brown and I attended that meeting, in the office of Mr. C. H. Hoiles. We represented the union, and Mr. Hoiles and Mr. Hanna represented the Register Publishing Company.

Q. Mr. Brown being the gentleman who testified previously in this hearing? A. Yes.

Q. What did you discuss at that meeting of April 15, 1940?

A. At that meeting we offered to decrease our

(Testimony of George William Duke.)

request to $1.06 per hour, at the same time asking that in view of the fact that we had made a conciliatory move, that the owners [208] of the Register also make a conciliatory move and reduce the agreement which we hoped to make to writing, and sign the agreement.

Q. What was the response to Mr. Hoiles, if any, to the union's counter-proposals to reduce the wages to $1.06 an hour?

A. To increase them to $1.06 an hour; he refused to increase the wages and said that he would not consider signing the contract; that his word was good; he had always kept his word, and we did not need to fear he would violate the contract. But we asked it be done, because it would show good faith on his part, and good faith on our part.

Mr. Sargent: I ask that that go out, unless it was conversation at the time.

Trial Examiner Moslow: Are you testifying as to what Mr. Hoiles said at that time?

The Witness: I am testifying as to what he said, and what we said in answer to the statement he made.

Trial Examiner Moslow: To the April 15 conference?

The Witness: Yes.

Trial Examiner Moslow: Objection overruled.

Mr. Sargent: Mr. Examiner, would you get the last answer read so that you can remember my objection?

Trial Examiner Moslow: Read the answer.

(Testimony of George William Duke.)

(The answer was read.) [209]

Mr. Sargent: The last conclusion is what I ask may go out, as to why the union asked it be done.

Trial Examiner Moslow: Is this something you told Mr. Hoiles, or are you giving a conclusion as to why you wanted a written contract?

The Witness: I am not giving a conclusion. I am giving the arguments which we presented to him as to why he should sign a contract.

Trial Examiner Moslow: Very well. My ruling will stand.

Q. (By Mr. Ryan): Did the union make any other request upon the company at that meeting other than those you have already indicated?

A. Mr. Brown made a proposition that we submit the case to arbitration. He asked Mr. Hoiles what his position would be with respect to arbitration.

Q. Will you tell us what Mr. Hoiles said, if anything, to that?

A. Mr. Hoiles said he would have to take the position that he would not agree to submit the case to a third party.

Q. Are you familiar with the custom in the newspaper industry where contractual relations have existed between the International Typographical Union and the newspaper publishers with respect to that matter of arbitrating differences?

A. I have had no personal experience with it.

Q. Do you know? [210] A. I know of it.

(Testimony of George William Duke.)

Q. Do you know that is a custom or is not a custom?

A. I have read many cases of it. In reading those cases I have based my observation that it is being done quite largely.

Mr. Sargent: I think this is hearsay and he isn't an expert, the way Mr. Brown is, in relation to international laws, and locals; unless he knows——

Trial Examiner Moslow: His answer doesn't indicate anything but that he is aware of a custom. I will let his answer stand.

I would suggest that if you want to establish a custom, Mr. Ryan, you follow Mr. Sargent's suggestion and call an expert, or Mr. Brown.

Q. (By Mr. Ryan): Did you reach any agreement with the representatives of the company at this meeting?

A. No, we did not reach an agreement.

Q. With respect to any of the matters in negotiation?

A. No. Agreement was not reached on any of them.

Q. Did you request the company to submit any counter-proposal to you?

A. Yes. At every meeting when we would make a proposal to Mr. Hoiles and Mr. Hanna, we would also ask if they didn't have some counter-proposition they would make to us that we might present to the union and thus settle the case. [211]

Q. Had the union previously rejected the counter proposals which had been submitted by the com-

(Testimony of George William Duke.)

pany representatives to the union, after the first meeting which was held in the first week of March?

Mr. Sargent: I object to the question as calling for a conclusion, instead of asking what action the union had taken, if any, in regard to it.

Trial Examiner Moslow: Objection overruled.

The Witness: Yes. The union had taken action on the counter-proposition of the publishers and had rejected the counter-proposition. We rejected it——

Trial Examiner Moslow: That is all you were asked, Mr. Duke.

Q. (By Mr. Ryan): Did you wish to explain your answer further?

A. Yes. I would like to.

Q. Go ahead. Unless, just a minute.

Mr. Ryan: Mr. Examiner, as I understand it—I did not wish to oppose the ruling of the Examiner, but you did not make a ruling but merely restrained the witness after he answered the question.

Mr. Sargent: I have no objection to the witness telling what was done or said. I would ask the witness not give any conclusions or reactions or opinions.

Trial Examiner Moslow: Very well. [212]

The Witness: May I state the reason for rejecting the counter-proposition?

Trial Examiner Moslow: Were these reasons made known to Mr. Hoiles?

The Witness: Yes, sir.

Trial Examiner Moslow: When?

The Witness: At our next meeting.

(Testimony of George William Duke.)

Trial Examiner Moslow: You can tell what you told Mr. Hoiles at the next meeting.

The Witness: That would be the meeting we are discussing now, the April 15th meeting.

Trial Examiner Moslow: Yes.

The Witness: We told Mr. Hoiles we could not accept the counter-propositions, because they did not comply with the union laws, and we could not make a contract with him which would violate international law.

Q. (By Mr. Ryan): Did you point out to him, Mr. Duke, specifically, that his proposal with respect to apprentices—— A. Yes.

Q. ——was objectionable to the union?

A. Yes.

Q. What did Mr. Hoiles say when you pointed that out to him?

A. I do not recall his exact words. We asked him then for a further counter-proposition, and he would not give us a further counter-proposition. [213]

Mr. Sargent: May I ask that go out and you tell us as to what Mr. Hoiles actually said?

Trial Examiner Moslow: I will let it stand.

Q. (By Mr. Ryan): Did you subsequently attend any further meetings with the management as a representative of the union?

A. Yes; May 3, 1940.

Q. And who were the parties present on behalf of the company and the union at that meeting?

A. Mr. Brown and myself were representing

(Testimony of George William Duke.)

the union, Mr. Hoiles and Mr. Hanna were present representing the company.

Q. What was the subject of discussion at that meeting?

A. We had a third proposal to make to them at the time.

Q. The union made a new counter-proposal to the company? A. Yes, we made a new one.

Q. Explain that.

A. Offering to work for still less of an increase in wages, a graduated scale which would extend over a period of three years, or a contract extending over three years.

We offered to work for $1.03 an hour beginning with the agreement, for a period of a few months which would end September 1, 1940, and beginning September 1, 1940 for six months, ending March 1, 1941 at $1.04 an hour. On March 1, 1941——

Trial Examiner Moslow: I will cut you short, Mr. Duke; was that the same proposal and the same rates Mr. Brown [214] testified to?

The Witness: Exactly the same.

Q. (By Mr. Ryan): What did Mr. Hoiles say in response to that proposal of wages, if anything?

A. He said that he could not agree to an increase in wages regardless of how small it might be, and that is he would grant an increase to the union members in the shop, that he would expect to be called upon to grant increases in wages to every employee in his publishing company.

(Testimony of George William Duke.)

Q. Did you make any proposal with respect to vacations at the same time?

A. Yes, vacations were the same.

Q. Was that the same as the one outlined by Mr. Brown?

A. By Mr. Brown, the same vacation request.

Q. Did Mr. Hoiles agree to take these counter-proposals under advisement at that meeting?

A. Oh, I believe he did. I believe that rather than deny—refuse to accept them at this time, I believe he took them under advisement. I believe we stated at that time, I know during 1940 we stated twice, at least, and I believe it was at this meeting that we again stated that due to the fact that we were making further conciliations, we would like to have him sign a contract if we were in agreement on it.

Q. What did he say?

A. He said he would not sign the contract. [215]

Q. Mr. Hoiles said that? A. Yes.

Q. In these negotiations you have indicated that Mr. Hanna was present also? A. Yes, sir.

Q. Did he at any time ever make any statements agreeing to any proposals of the union, or did Mr. Hoiles do all the talking?

A. Mr. Hoiles did practically all the talking.

Q. Was Mr. Hoiles the spokesman for the representatives of the company in these negotiations?

A. Yes, sir.

Q. After the conference of May 3, 1940 did you have any further conference between the union committee and the company's committee?

(Testimony of George William Duke.)

A. On May 16, 1940 we had another conference. Mr. Brown and myself representing the union; the Mr. Hoiles and Mr. Hanna representing the owners of the paper.

Q. All right. What was the subject of discussion at that meeting?

A. Mr. Hoiles stated that he could not consider the increase in wages regardless of how small, and we asked Mr. Hoiles if it would embarrass the Register financially to give us such an increase. He stated that it would not embarrass the Register financially, but it was against their policy, and [216] that if an increase in wages was granted to us, that an increase in wages would be expected to be granted to all employees of the Register.

Trial Examiner Moslow: You previously said May 3; do you now mean to say May 16th?

The Witness: Did I not correct myself on that before? Now I say the May 16th meeting.

Trial Examiner Moslow: At the May 3rd meeting he took the matter under advisement and at the May 16th meeting he gave you his answer?

The Witness: That is right.

Q. (By Mr. Ryan): With respect to the proposal you had made at the May 3rd meeting, with regard to vacations, what did he say with respect to that?

A. He said he would still have to maintain the same policy concerning vacations as he had always had toward the union members in his shop.

Q. And what was that policy?

(Testimony of George William Duke.)

A. As long as he had to pay time and a half for overtime for his union men, that he could not grant a vacation with pay to them.

Q. Did you arrive at any contract agreement with respect to wages, hours, and other conditions at this May 16th conference? A. No. [217]

Q. After the May 16th, 1940 conference were further negotiations held between the company representatives and the union representatives?

A. No further negotiations were held until the next year. The union, in session, came to the conclusion that it was useless to continue——

Mr. Sargent: Just a minute, please.

Trial Examiner Moslow: I will strike that last remark. Proceed.

Q. (By Mr. Ryan): Were negotiations held in abeyance after the May 16, 1940 meeting, by the union?

A. Negotiations were held in abeyance.

Q. Were negotiations resumed in the year 1941?

A. Yes, they were resumed.

Q. Would you tell us about that, about the resumption of negotiations in 1941?

A. An adoption of a new scale was made between the—or, the contract, calling not only for the scale, but for all other union conditions that go with the scale, was made between the commercial shops and the union, and signed by the commercial shops.

Q. Where? What commercial shops?

A. In Santa Ana and Laguna Beach, Newport Beach, all those within the jurisdiction of the Santa

(Testimony of George William Duke.)

Ana Union. These shops all signed, and after this time we made it known to the [218] owner of the Register that we wished to resume negotiations with them, also; and I believe we stated by letter that we would request them to pay $1.07 an hour beginning May 1, 1941 and extending to October 1, 1941.

Trial Examiner Moslow: Excuse me. Is that letter in evidence now?

Mr. Ryan: No, it isn't.

Please mark this as the Board's next exhibit in order.

(Thereupon the document referred to was marked as Board's Exhibit No. 9, for identification.)

Mr. Ryan: I would like to make the request, Mr. Sargent, that you produce the original letter which was sent under date of April 15, 1941.

Trial Examiner Moslow: If you have a copy I am content to receive the copy, if it satisfies the respondent.

Mr. Ryan: All right.

Q. (By Mr. Ryan): Mr. Duke, I show you what has been marked Board's Exhibit 9 for identification, and ask you if you can tell us what it is.

A. This is the letter notifying the owner of the Register, particularly Mr. Hoiles, the letter I was discussing.

Q. Is it a letter addressed to Mr. C. H. Hoiles of the Santa Ana Register, under date of April 15, 1941, from the Santa Ana Union?

(Testimony of George William Duke.)

A. Typographical Union. [219]

Q. Typographical Union. Is that right?

A. That is right.

Q. Was that letter mailed?

A. It was mailed.

Q. This is a copy of the letter. I offer Board's Exhibit 9 for identification in evidence. I will show it to counsel.

Mr. Sargent: We do not seem to have the original letter, and my client isn't sure that is an exact copy, but we assume it is.

Trial Examiner Moslow: If it turns out later it isn't, we will have the record corrected. Board's Exhibit 9 will be received in evidence.

(Thereupon the document heretofore marked as Board's Exhibit 9 for identification, was received in evidence.)

BOARD'S EXHIBIT No. 9

Santa Ana, Calif.,
April 15, 1941

Mr. C. H. Hoiles,
Santa Ana Register

Dear Mr. Hoiles:

The Santa Ana Typographical Union has instructed its scale committee to offer you the following proposition as a fair and equitable basis for adjusting the differences that exist between it and the Santa Ana Register:

One dollar and seven cents ($1.07) until

(Testimony of George William Duke.)

October 1st, then one dollar and twelve cents ($1.12) per hour until March 31st, 1942.

The Union is willing to be fair and reasonable in its requests, and is now asking that you pay its members working for you, the prevailing wage in the city of Santa Ana.

May we ask you to consider this proposition favorably, and give the union an answer before Friday evening at 7:30, when a meeting of the union will be held to further discuss the matter?

Anticipating your favorable reply, we remain.

Very truly yours,

.....

Committee Chairman.

.....

.....

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Q. (By Mr. Ryan): You have already testified that this new scale in 1941 was agreed upon between the Santa Ana Union and some commercial job printing companies. Is that right?

A. Yes, sir.

Q. Were any newspaper publishers also under contract with you for this new scale of wages at the time you opened negotiations in 1941 with the Register Publishing Company, Ltd.?

A. Yes. The South Coast News of Laguna

(Testimony of George William Duke.)

Beach; the Newport News of Newport Beach, and the Santa Ana Independent of Santa Ana.

Q. What was the date of the first meeting between repre- [220] sentatives of the company and the union in 1941, with respect to negotiations for this new scale? A. April 3, 1941.

Trial Examiner Moslow: Excuse me. I didn't get the other answer. Will you read it?

(The record was read.)

Q. (By Mr. Ryan): Who was present at the first meeting on behalf of the union and on behalf of the company?

Trial Examiner Moslow: You say April 3rd?

The Witness: Approximately that time. I will not state it was exactly April 3rd.

Q. (By Mr. Ryan): The letter bears the date of April 15th. Was your first meeting before you sent the letter or after?

A. No, it was after. I am sorry. I am not clear on that. It must have been April 18th, then.

Q. Who were the parties present? At the first meeting, on behalf of the union and the company?

A. Mr. Brown was present and I was present representing the union, and I think at that first meeting Mr. Taylor was present.

Q. Representing the union also?

A. Representing the union. Representing the Register, Mr. C. H. *O*iles and Mr. Ralph Juillard.

Q. Did the union representatives discuss this new wage proposal which is incorporated in this

(Testimony of George William Duke.)

letter of April 15th [221] and which is in evidence as Board's Exhibit 9?

Mr. Sargent: I won't object to that question; but don't lead him any more, Mr. Ryan. Just ask him what took place, please.

Mr. Ryan: I will withdraw the question.

Q. (By Mr. Ryan): What did you discuss at this meeting of April 18th, or about that time?

A. We discussed the letter we had sent to Mr. Hoiles, notifying him of the fact we would like to negotiate a new wage scale and a new contract, and we stated to him that several other parties had agreed to and signed this contract and we would like to have him do the same.

Q. Did you present him with an actual, physical document or contract?

A. I think that document was there. I think we all looked at it and talked about its provisions and terms.

Q. Were there any specific—strike that.

With respect to the proposal for an increase in wages, what was the company's position as expressed by Mr. C. H. Hoiles, if anything?

A. At the first meeting we held with Mr. Hoiles, I asked him if he would take the position in 1941 that he had taken in 1940, that he would refuse to consider any increase in wages whatsoever. He did not answer at that time concerning what his position would be. [222]

What was that question again? I think I didn't answer all of it.

(Testimony of George William Duke.)

Q. Read the question.

(The question was read.)

Trial Examiner Moslow: Read the answer too, please.

(The answer was read.)

The Witness: He objected also to the—he objected at this time to the statement which we made in presenting the request for $1.07 an hour, calling it the prevailing wage in Santa Ana and vicinity. He objected to that. But we argued with him that it was the prevailing wage because other newspapers and other commercial shops in Santa Ana and vicinity had agreed to it and had signed the agreement.

Q. (By Mr. Ryan): Were any further statements made by the company representatives or the union with respect to the matter of wages, hours, or working conditions, at this meeting?

A. May I have time to consider that question a moment, please?

Q. Do you understand the question?

A. I do not understand the question.

Q. I withdraw the question.

Did Mr. Hoiles make any statement regarding whether or not he would accept or reject increases in wages?

Mr. Sargent: I object to that as leading, again.

[223]

The Witness: I will state this:—

(Testimony of George William Duke.)

Trial Examiner Moslow: I will overrule the objection.

The Witness: I will state that Mr. Hoiles refused to grant the increase in wages. I do not recall——

Mr. Sargent: Just a minute. I ask the witness be asked to tell what Mr. Hoiles said, rather than a conclusion.

Trial Examiner Moslow: Very well. Let him finish his answer first.

The Witness: I would like to make the statement that I am not exactly clear as to exactly which meeting Mr. Hoiles made this statement I am going to make, but it was at a meeting held in April, 1941, when Mr. Hoiles did finally say he would not consent to any increase in wages regardless of how small they might be, reiterating his statement of a year ago, that if he would give any increase to union printers he would have to give an increase to every employee in the shop. He also refused to consider signing an agreement with us.

Trial Examiner Moslow: You say "He also refused to consider." What did he say?

The Witness: He also said he would not sign an agreement with us.

Trial Examiner Moslow: Did he explain why he wouldn't sign?

The Witness: He said, as he had in 1940, that his word [224] was good, and we had no reason to fear he would violate the contract.

(Testimony of George William Duke.)

Q. (By Mr. Ryan): Did the representatives of the company at this meeting make any proposals to the union with respect to wages, hours, or working conditions?

A. No, no proposals were made at that meeting.

Q. Did you arrive at any agreement with respect to wages, hours, or working conditions at this meeting? A. No.

Q. Did you arrange to have another meeting with the management at the termination of that meeting? A. Yes.

Q. When was this next meeting to occur?

A. April 26th, as I recall.

Q. Did you have a meeting on April 26th with the management? A. No.

Q. With the Register Publishing Company?

A. No. I believe that was on Saturday, and we waited for some time outside the offices of Mr. C. H. Hoiles.

Q. When you say "we waited" whom do you mean?

A. Mr. Brown and myself. Mr. Patison also was present.

Q. On behalf of the union?

A. On behalf of the union. Mr. Hoiles appeared and stated that the executives of the Register, or perhaps he said directors, were going into the whole matter and that a letter [225] would be sent to Mr. Brown stating the company's position,

(Testimony of George William Duke.)

the letter to be received by Mr. Brown by next Monday.

I said to Mr. Hoiles, "I hope that we can come to an agreement on this matter."

And he said, "I hope so too."

Q. Which of the two Hoiles do you have reference to?

A. Mr. C. H. Hoiles made that remark.

Q. After this statement by Mr. Hoiles what did you and Mr. Brown and Mr. Patison do, if anything?

A. We told him we would wait for his letter and consider it.

Q. Did the union take any action before receiving the letter from the company?

A. No. No action was taken until the letter was received.

Q. When did you receive the letter?

A. April 29th.

Q. After receiving the letter from the company did the union take any action with respect to the matters referred to in the letter?

A. Yes. The union met April 30th, and considered the letter and the proposals made in it and reviewed the proposals that had been made by the Register, and reviewed the differences between the Register Publishing Company and our union.

Those differences were: That we could not agree to a written, signed contract; we could not agree on the apprentice question, as to the number of apprentices, since the office [226] wished full control

(Testimony of George William Duke.)

of the training of the apprentices. We could not agree to a request of the company that had been made previous to this time, that no discrimination be made between union and non-union members. We could not agree with their request that a man be hired for less than a full day's work. We could not agree with the request that straight matter operators be paid less than the scale, a request being made to pay them 75 cents an hour.

Reviewing these differences the union took a strike vote to determine whether or not we would go on strike and so we did take the strike vote.

Q. What was the result of that vote?

A. The result was that more than a three-quarters majority was cast by secret ballot in favor of a strike.

Q. Did the union take any steps to notify the company as to their actions in this matter, about the strike?

A. Yes. Mr. Patison and myself were delegated to notify Mr. Hoiles of our action.

Q. Who is Mr. Patison?

A. Mr. Patison was a member of the negotiating committee, a member of the union.

Trial Examiner Moslow: What is his first name?

The Witness: J. H. Patison.

Mr. Sargent: Patterson or Patison?

The Witness P-a-t-i-s-o-n. [227]

Q. (By Mr. Ryan): Where is Mr. Patison now?

(Testimony of George William Duke.)

A. I believe Mr. Patison is in Denver, Colorado.

Q. Did you and Mr. Patison meet with any representatives of the company following this union meeting where the strike vote was taken?

A. Yes. We met with Mr. C. H. Hoiles.

Q. When did you meet with him?

A. About 9:00 or 9:30 p.m.

Q. In the evening? A. Yes.

Q. What date? A. April 30th.

Q. Was that the same day the strike meeting was held?

A. The same day the strike vote was taken.

Q. That was immediately following the meeting? A. Yes.

Q. Did you confer with Mr. C. H. Hoiles?

A. Yes.

Q. What was the gist of that conversation? What was said by you and what was said by him?

A. I said to Mr. Hoiles that the union had voted to go out on strike the next morning, at 7:00 o'clock, in view of the fact we could not reach an agreement on our differences, and that we would consider—we had not told the crew that was then working to leave the employ of the Register until 7:00 [228] o'clock in the morning.

Mr. Hoiles said, "That is very nice, and I want you to know that R. C." as he called his father, "and I have not wanted this thing."

And I objected. I said, "Mr. Hoiles, we feel that you have wanted it, both you and your father.

(Testimony of George William Duke.)

We feel that your father's strong policy and his sharp criticism towards us in his editorial columns has antagonized and embittered the local union to the point that the various differences that exist between us cannot be ironed out."

That is the gist of my remarks. Those are not verbatim.

Mr. Hoiles said, "Well, you are your own judge in those matters," or words to that effect, and he allowed us to leave his office at that time.

Q. Did he make any other statement to you or is that all he said to you?

A. That's all I recall at present.

Q. At that time was there a day crew and a night crew working in the composing room of the Register? A. Yes.

Q. Was a picket line established pursuant to your vote to strike?

A. Yes, a picket line was established the next day.

Q. And did the employees go out on strike, who were working in the composing room? [229]

A. The employees went out on strike at 11:00 o'clock that eveinng.

Q. They went out at 11:00 o'clock the previous night?

Trial Examiner Moslow: That is, the employees of the night shift?

The Witness: The employees of the night shift went out on strike, and the employees of the day shift did not come to work on May 1st.

(Testimony of George William Duke.)

Q. (By Mr. Ryan): On the morning of May 1st, after the picket line was established, did you on behalf of the union have a conversation with Mr. C. H. Hoiles? A. Yes.

Q. Will you tell us what that conversation was and where it took place?

A. I understood that Mr. Hoiles had asked to see me and I went down to see Mr. C. H. Hoiles and I said, "Did you wish to see me?"

And he said, "No."

I said, "Well," I said, "I see that you are going along fine. You have the shop full of men, but I want you to know that any time you get tired of this arrangement that we are still willing to negotiate with you and come back into your employ as a group."

Mr. Hoiles stated, "And I want to say to you that any time any of your men wish to come back, that you will be [230] considered individually."

I made some other remark, which does not pertain to the occasion.

Mr. Sargent: Will you hold that just a second, please?

Q. (By Mr. Ryan): When you say that you saw employees working in there on the morning of May 1st, when you went in to talk to Mr. Hoiles, were they the same employees that had been working in there previously, or were those employees who had, previous to the calling of the strike, gone out on strike? Or were these new employees working in the shop when you were there?

(Testimony of George William Duke.)

A. Previous employees who were members of the union had gone on strike, in the office at this time, was Mr. William A. Lawrence, who was formerly a member of the union, and had severed his relations the night of the strike. And with him, a large number of non-union men who had been called in to break the strike.

Mr. Sargent: I object to that.

Trial Examiner Moslow: Well, I don't pay much attention to his characterizations. Let the answer stand.

Mr. Sargent: I ask that we may go off the record.

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Mr. Sargent: I ask this may be stricken from the record, [231] his characterization.

Trial Examiner Moslow: Well, his characterization may be stricken.

How many of the so-called employees did you see?

The Witness: I do not know the exact number.

Trial Examiner Moslow: Approximately?

The Witness: Approximately 15.

Trial Examiner Moslow: How much more do you have of this witness? Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record. Proceed.

Q. (By Mr. Ryan): Mr. Duke, after this con-

(Testimony of George William Duke.)

versation that you have just related with Mr. Hoiles, did you have any further conversation with him at any subsequent date or time?

A. None that I can recall.

Q. Did the strike, which began on May 1st, continue and is it still continuing?

A. The strike is still continuing.

Q. Yes. Did you attend a union meeting on or about July 25, 1941?

A. No. I left Santa Ana and sought work in Los Angeles.

Q. You were not present at that meeting?

A. No, sir.

Mr. Ryan I have no further questions.

Trial Examiner Moslow: We will recess until 1:30.

(Whereupon, at 12:30 o'clock p.m., a recess was taken until 1:30 o'clock p.m.) [232]

Afternoon Session

(The hearing was reconvened at 1:30 o'clock p. m.)

Trial Examiner Moslow: The hearing will come to order.

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GEORGE WILLIAM DUKE

resumed the stand as a witness for the National Labor Relations Board, having been previously duly sworn, and testified further as follows:

Direct Examination—(Continued)

Mr. Ryan: Mr. Examiner, there are a few ques-

(Testimony of George William Duke.)

tions I would still like to bring out by this witness that I neglected to ask.

Q. (By Mr. Ryan): Mr. Duke, is there any provision in the constitution and by-laws of the International Typographical Union which imposes penalties upon a local union for violation of international laws?

A. Yes, Section 2 of Article X, international laws, laws of the International Typographical Union, provide such penalties.

Q. That is on page 16, under Article X, entitled "Penalties," Section 2?

Mr. Sargent: What book have you?

Mr. Ryan: The 1940 book, and I also have the 1941 and 1942 books here and I will show them to the respondent's counsel and ask for a stipulation that the same provision is in each one of those by-laws, in the identical language.

Mr. Sargent: I object to this as not being shown that [233] anything which was requested was in violation of the I.T.U. by-laws and constitution.

Trial Examiner Moslow: Overruled; is there a stipulation that the provisions are the same or identical in the 1941 and 1942 by-laws?

Mr. Sargent: Was your ruling to the effect that there was something that had been shown in the evidence here whereby the management's proposal was contrary to the I.T.U. rules?

Trial Examiner Moslow: That wasn't the question. The question merely was: Were there pen-

(Testimony of George William Duke.)

alties for violation. If you can't stipulate on the provisions being identical, may I ask you——

Mr. Sargent: Mr. Examiner, I will assist counsel in any ministerial things, so far as I can. I believe these are the same. My objection goes to the heart of the question, not to the fact of whether they are identical.

Trial Examiner Moslow: Do you stipulate, Mr. Ryan, they are the same?

Mr. Ryan: I am stipulating they are identical.

Trial Examiner Moslow: Very well.

Q. (By Mr. Ryan): In your testimony this morning there was testimony brought out by questioning of you with respect to Board's Exhibit 9 for identification. I ask you now whether or not after reflection on the matter, that is an identical duplicate of the letter that was sent to the company under [234] date of April 15, 1941.

A. No. Upon reflection this is a letter which was typed by myself after I wrote the other letter, from my own recollection, and I furnished it to the Board for their consideration when the matter came up. But it is identical, so far as the amounts are concerned. In other words, I wrote this copy from memory, about April 15th; but the other letter was written about April 3, 1941.

Mr. Sargent: In view of that I will have to ask the letter go out. The letter itself is the best evidence.

Mr. Ryan: I will ask the respondent to produce the letter.

(Testimony of George William Duke.)

Mr. Sargent: If we have the letter we will produce it. My client looked for it but was unable to find it. I ask the copy go out, being not only not a copy but merely an after recollection of what the witness thought the letter contained.

Trial Examiner Moslow: I will let the exhibit remain, but it will be considered in the light of the witness' testimony until such time as the original is produced.

Mr. Sargent: Does Mr. Ryan know the date? Of the original letter?

Mr. Ryan: I don't know the exact date, but from the witness, I understand it was around or about the 3rd of April, 1941, on or about that time. The contents of that [235] letter was set forth in a resume in the document which is now in evidence.

Q. (By Mr. Ryan): Did you, on or about January 15, 1941, have a conversation with Mr. R. C. Hoiles? A. Yes, sir.

Mr. Sargent: What was this date, please?

Mr. Ryan: January 15, 1941.

The Witness: Yes, sir.

Q. (By Mr. Ryan): Where did that conversation take place?

A. It took place in the composing room on the Santa Ana Daily Register.

Q. Will you tell us what was said by Mr. Hoiles and what was said by you in the conversation?

Mr. Sargent: Just a minute. Will you please indicate whether anybody else was present?

Mr. Ryan: Yes.

(Testimony of George William Duke.)

Q. (By Mr. Ryan): Was anybody else present? A. No. It was a private conversation.

Trial Examiner Moslow: Who is R. C. Hoiles?

The Witness: The owner of the Santa Ana Register.

Trial Examiner Moslow: What is his relationship to C. H. Hoiles?

The Witness: Father.

Trial Examiner Moslow: May we have his official office, Mr. Sargent? [236]

Mr. Sargent: President of the company. Might I ask before Mr. Ryan asks his question, whether this had anything to do with the negotiations between the union and the paper?

Mr. Ryan: It has to do with the issues in this case, but it does not have—I won't go so far as to state that it has nothing to do directly with the issues in the bargaining.

Mr. Sargent: Mr. Examiner, I have been waiting for the time in this trial when Mr. Ryan would seek to bring before you certain matters which he deemed might have some import upon the negotiations, but which the respondent believes not only have nothing to do with the negotiations, but not with the issues involved herein.

If this conversation relates to any part of the negotiations, I will not object to it. If, on the other hand, it is merely a conversation between Mr. Hoiles, an officer of the company, or as an individual with one of his employees on something not

(Testimony of George William Duke.)

pertaining to the negotiations, then I shall object, and ask the evidence not be given.

This objection will apply to a number of situations that may arise later on, particularly with respect to editorials, which situation has already been referred to by one of the witnesses for the Board. I would like to make an objection now which will cover this, and also the editorials, or any other extraneous matter.

Trial Examiner Moslow: The complaint alleges that both [237] the Hoiles on certain occasions made statements said to be in violation of the Act. What is the ground for your objection? If this is one of those statements? Is this one of those statements, Mr. Ryan?

Mr. Ryan: Yes.

Trial Examiner Moslow: What is the ground for your objection?

Mr. Sargent: Counsel assumes that an editorial——

Mr. Ryan: I haven't indicated I am going to ask him about an editorial on this specific question. You are anticipating something.

Mr. Sargent: I didn't know from you there were any conversations other than about editorials. In other words, the issue is this case is whether or not this company bargained collectively in good faith with this union.

Trial Examiner Moslow: That is one of the issues. The complaint also alleges, in paragraph 6,

(Testimony of George William Duke.)
that the respondent violated Section 8, subdivision 1, of the Act, by various statements.

Mr. Sargent: The charge isn't supported by any showing that any employee did do or did not do anything as a result of it. This man remained in the employ of the company up to the date of the discharge. They were all union men. There wasn't a question of having one union man and a non-union man. [238]

Trial Examiner Moslow: Is it your point that a statement can't be in violation of the Act unless it has the actual effect of intimidating employees?

Mr. Sargent: Unless there was a possibility of intimidation, which is here clearly shown not to be the case with this employee, who stayed on his job, the effort to bring in something, which I don't know what is going to be brought in, would be solely to bring into the record something which might be prejudicial if it existed.

Trial Examiner Moslow: I disagree as to the law. Even an attempt, though unsuccessful, to interfere or coerce the employees would be a violation of the Act.

Mr. Sargent: But here, Mr. Examiner, the evidence shows this man was upon the job on April 15th; that he remained on the job; that it was a union shop; that he was the head of the union. For what purpose can this be brought in save there is an attempt to make this part of the negotiations, which now counsel says isn't the case?

Trial Examiner Moslow: I am sure I don't

(Testimony of George William Duke.)

know what the conversation was, but I am telling you if there were some of the conversation alleged in the complaint, it is relevant; and I could cite you cases decided by the Third Circuit, of the Newark Publishing Company, publishing the Newark Ledger, where the full bank of the Third Circuit held the employer might violate the Act at the same time he had a closed [239] shop with the union.

I suggest that I will overrule the objection at this time and if you still think the matter is irrelevant you may make a motion to strike at the end.

Mr. Sargent: Very well.

Q. (By Mr. Ryan): Tell us what you said.

A. We had been discussing union labor in general, and Mr. Hoiles became incensed, angry, and——

Mr. Sargent: Just a minute.

The Witness: I have to introduce the subject we are talking about before I can make remarks made.

Mr. Sargent: What I am objecting to your characterization that Mr. Hoiles became angry. I have no objection to your saying, subject to my general objection, what he said or did.

Trial Examiner Moslow: If you say you saw Mr. Hoiles angry, you may testify. But don't testify he became incensed, and don't characterize his remarks. You can testify his position.

The Witness: He was angry. I first said, "Mr. Hoiles, if you do not like union labor in your em-

(Testimony of George William Duke.)

ploy, why don't you discharge all of us and employ non-union labor?"

Mr. Hoiles replied, "Oh, the Wagner Act and its provisions would force me to reinstate all of them and give them back pay too." [240]

Q. (By Mr. Ryan): Did he say anything else?

Mr. Sargent: Just one second, please, until I get this down. All right. Thank you.

Q. (By Mr. Ryan): What else did he say?

A. What was it I just said? I want to see if I got it all.

(The answer was read.)

Q. (By Mr. Ryan): Did he say anything else? Did he say anything about union printers?

A. Instead of the word "them"—that is the conversation approximately as I recall it. He may have said——

Mr. Sargent: Would you quit just a minute? "May have said" I object to.

Trial Examiner Moslow: Let the witness answer in each case. Thereafter, you make a motion to strike.

Mr. Sargent: Mr. Examiner——

Trial Examiner Moslow: I don't like to see him interrupted. There is no harm done if he testifies, and I strike it.

Mr. Sargent: But then you have it in the record, things that are prejudicial, which are incompetent; when he says "may have said" it is obviously an invitation to draw a conclusion which should not be drawn.

(Testimony of George William Duke.)

Trial Examiner Moslow: It won't be in the record if I grant your motion to strike.

Mr. Sargent: I will wait until you get through. There [241] was something else in this conversation? I will wait until you get though with that.

Trial Examiner Moslow: Were you about to say something?

The Witness: That he may have stipulated union printers there directly. I'll try to recall again what he said to me.

"Oh, the Wagner Act and its provisions would force me to reinstate the union printers and give them back pay too."

That's the way I recall the conversation.

Trial Examiner Moslow: I will hear you now, Mr. Sargent.

Mr. Sargent: Now, this is the kind of remark which has nothing to do with these negotiations in any way or nature. While I don't think the remark is worth having a heated argument about, or going into great detail, it is one of the things which, if brought in, is going to becloud the issue, because of what might be a personal opinion of an officer of the company, and having nothing to do with the negotiations.

I assume you, Mr. Examiner, admitted this because you thought that the remark of Mr. Hoiles might be constructed as being intimidation upon, or a threat of intimidation upon this particular witness. The evidence shows that that did not take place. That he was here; that he was the president

(Testimony of George William Duke.)

of the union, and there isn't any connecting link between this statement and the negotiations about which, around which the case revolves. [242]

Therefore, not because this is important, but because we can extend the case ad infinitum if we get into extraneous things which don't have a bearing, I ask it be stricken out, and no more of those things put in, except as they have a bearing on the negotiations themselves.

Trial Examiner Moslow: I don't see any connection has to be shown between alleged statements and the negotiations. If statements were made, and if they were in violation of the Act, they are admissible in evidence, regardless of whether there were any negotiations.

Mr. Sargent: Do you take the position this is in violation of the Act?

Trial Examiner Moslow: As I said, if it is in violation of the Act it is admissible in evidence regardless of negotiations.

Mr. Sargent: I think you probably know law well enough to know that even with the present Board, and even with the Supreme Court being a liberal court, as it is, the Virginia Power Company case certainly admits some freedom on the part of the employer to express an opinion; and certainly, where there has been a general discussion between this man, who is president of the union, whose position was assured, and a man who had nothing to do with the negotiations, it wasn't something which

(Testimony of George William Duke.)

could be deemed to be intimidation, nor is there the slightest evidence of intimidaton. [243]

On the contrary, Mr. Duke went right ahead with his negotiations, thereafter, without the slightest hesitation. In fact, if anything, the conversation with Mr. R. C. Hoiles may have spurred his contact rather than have had any effect to the contrary.

Trial Examiner Moslow: I am not passing now on the weight of the evidence. I am merely deciding it is admissible in evidence and that will be my ruling throughout. Any other statements alleged to have been made by agents of the respondents to their employees you may have a general objection to if you wish, to any statements alleged to be interference.

Mr. Sargent: Mr. Examiner, wouldn't it be better to have either a foundation or some connection with the negotiations, or some connection with the attitude of some employee, where there was some opportunity to have some check of the statement? But simply a talk, a discussion between Mr. Hoiles and an employee, not factual, having nothing to do with the negotiations, having nothing to do with the job of the employee, that is not something which should properly be deemed to be an unfair labor practice, because it was beyond the sphere, in the first place, and had nothing to do with the relations, in the second place.

Trial Examiner Moslow: We are arguing whether it is to be received in evidence. [244]

(Testimony of George William Duke.)

Mr. Sargent: It could only be received as evidence.

Trial Examiner Moslow: That would depend on the entire picture, and the circumstances and the entire course of conduct, and may other factors. I am merely deciding I will receive it in evidence.

I think I have heard enough on this point.

Q. (By Mr. Ryan): Was anything else said which you have not related, during that conversation?

Trial Examiner Moslow: I don't understand, Mr. Duke. How did you happen to make your remark to him?

The Witness: As a result of his sharp criticism of union labor.

Trial Examiner Moslow: What did he say?

The Witness: I merely recalled this statement because it was so strongly implanted in my mind. I had many conversations with Mr. R. C. Hoiles, and many subjects were discussed: religion, commerce, unionism——

Trial Examiner Moslow: I am talking about this particular thing.

The Witness: I realize that. All the conversations are in my mind, but exactly what was said at this time, except sharp criticism of union labor, I can't recall the words used.

Mr. Sargent: I move to strike the words "sharp criticism of union labor." I have no further objection to the Examiner's ruling, but I do ask that the

(Testimony of George William Duke.)

words "sharp criticism of union [245] labor" may go out.

Trial Examiner Moslow: I will grant the motion.

At any rate, there was a discussion about unions when you made your remark?

The Witness: Yes, sir.

Mr. Ryan: I have no further questions. You may cross examine.

Cross Examination

Trial Examiner Moslow: Proceed.

Q. (By Mr. Sargent): When you started to testify this morning, Mr. Duke, with respect to combination men, you were referring, were you not, to combination men as being the most desirable men for an employer to have in a composing room? Is that right?

A. That is what I said, yes.

Q. Yes. For the simple reason that they were, as we say in football, triple threat men. They could do anything. Is that right?

A. They could work on the machine; they could also work in any department of the composing room.

Q. Yes. The more combination men which a paper had, the more flexibility it had with regard to its force, didn't it?

A. Those men are usually sought, by foremen, in order to give them leeway, so that they will not have to hire a floor operator for half a day, and also a man for a full day when [246] they had half

(Testimony of George William Duke.)

a day's work for him, and also a floor man at the same time.

Q. In other words, it is like a game of checkers. Instead of being able to move one way, like with a king, you can move any way. It is something which a shop wants, to get as many combination men as it can, to save putting on additional men?

A. You are asking me to say something I don't want——

Q. The more combination men that one has in a shop the less necessity there is for employing outside men. Right?

A. That would be a matter for the foreman to decide. He might like a whole group of straight matter operators, as you call them.

Q. No straight operator could operate a machine and do things other than straight things, could he? A. Yes, sir.

Q. Could the straight man do all the things a combination man could do?

A. On the machine. I have seen very few straight matter men that—they always, at various times during the day, were called upon to set markets, and advertising matter, and all sorts of production, for daily papers.

Q. You wouldn't attempt to claim a straight man can do as much as a combination man could do? A. On the machine.

Q. Or otherwise. I am not trying to trap you. I am trying [247] to elicit the truth. Isn't it true that a combination man is of much more benefit to

(Testimony of George William Duke.)

a shop because of the fact he can do anything in the composing room that a straight matter man would be——

A. I testified to that effect this morning.

Q. Yes. Now, do you happen to know in 1941 how many combination men there were in the shop of the respondent?

A. I know of at least three offhand.

A. Let us have the names of the three, please?

A. Mr. William Bray; Mr. Virgil Shidler.

Trial Examiner Moslow: Miss Reporter, you will find the group of names in paragraph 13 of the complaint.

The Witness: May I look at those to refresh my recollection?

Trial Examiner Moslow: Have you any objection, Mr. Sargent?

Mr. Sargent: Certainly not.

The Witness: While not employed as a combination man, Mr. J. W. Parkinson also had the ability.

Q. (By Mr. Sargent): Now, who determines in a shop whether he is a combination man or not?

A. The foreman.

Q. And was the foreman at the time a member of the union? A. Yes, sir.

Q. The name of the foreman is Mr. William Lawrence? [248] A. Yes, sir.

Q. If Mr. Lawrence made the statement that the only man who was a combination man was Mr. William Bray, would you dispute that?

(Testimony of George William Duke.)

A. Yes, sir.

Q. You would dispute it? A. Yes, sir.

Q. When you say Mr. Parkinson was employed, but not as a combination man, what do you mean by that?

A. I mean if he had experience and background he would have been competent in any angle of the production of a newspaper.

Q. What was he employed as?

A. He was employed as a linotype operator. He had machinist-operator experience. A machinist takes care of repairs of machines. He was—had floor experience, as it is called. He could go into the ad composition department of the newspaper and compose ads.

Q. Which shifts were these three people on at the time of the strike?

A. Mr. Bray was on the night shift, for the most part. He worked daytimes sometimes.

Q. Shidler? A. Daytime.

Q. Parkinson? A. Day shift. [249]

Q. If apprentices could have been placed upon machines at some time prior to their sixth year, it would have aided the composing room somewhat by reason of so few combination men, would it not?

Mr. Ryan: May I have the question read?

(The question was read.)

Mr. Ryan: I object to the question.

Trial Examiner Moslow: Objection overruled.

The Witness: In what way, please, sir?

Q. (By Mr. Sargent) In other words, you

(Testimony of George William Duke.)

could have placed your combination men doing something other than machine work, could you not?

A. You are implying that——

Q. Isn't that right?

A. ——that during a rush time—let me make the situation clear. It was during the rush time, as you have already contended, the need was on the machine. The rest of the composing room had its work pretty well done up by this time, with the exceptions of the make-up; the machine had the bulk of the work to carry, along about noon, between the hours of 10:00 A. M. and 2:00 P. M.; and I see no reason why a combination man already on the machine would be of any benefit.

Q. If you could have worked the apprentices prior to their sixth year on the machines, it would have given the office, [250] the composing room, a greater flexibility, so far as the personnel of the composing room was concerned. Is that right?

A. No. I deny that.

Q. Why do you deny it?

A. I deny it for this reason: By testimony, by the evidence that you have attempted to place in evidence, the statements you have attempted to make, you have attempted to make it appear that a straight matter operator is an inferior person and that their activities in the composing room—that they deserve less pay, and my personal experience with straight matter operators——

Q. We are not getting onto that.

A. I am trying to answer your question.

(Testimony of George William Duke.)

Q. Will you limit yourself to apprentices for the moment?

A. I can't do that without explaining what I mean.

Q. Go ahead.

A. I will try to stay on the subject, and I believe I am on the subject when I say a straight matter operator, by his speed and his production does as much work for the company during the day as any other employee, but does not, perhaps, do the certain type that some other men might do.

Q. Mr. Duke, we aren't discussing straight matter operators. But, whether it wouldn't give greater flexibility if prior to the sixth year the apprentices were permitted to work on the machines? [251]

A. I am denying that, because we already had men capable of doing those jobs. How would it help the office to put on an inexperienced and unskilled operator during the day when they already have a good man on the machine?

Q. If you had apprentices able to work on the machines there would have been more men in the shop able to work the machines.

A. There may have been too many.

Mr. Sargent: Mr. Examiner, I am not trying to trap this man. I am trying to get an honest answer and he is avoiding every question by trying to get something else in when I ask him a question. I hope you will take that into consideration during the cross examination.

Q. (By Mr. Sargent) I believe you testified—

(Testimony of George William Duke.)

Mr. Ryan: I object to your characterization of the witness.

Mr. Sargent: You know, Mr. Ryan, that he has refused to answer the questions, point blank.

Trial Examiner Moslow: Mr. Sargent, I think it is improper for you to make those remarks during the time of the hearing. They properly belong in a brief, or in any argument addressed to me at the end of the hearing.

Mr. Sargent: I addressed it to you, Mr. Examiner.

Trial Examiner Moslow: I am here to observe the demeanor of the witness and his manner of answering, and I will decide [252] whether or not he is trying to answer candidly or to avoid answering. If you wish to help me in that task you may do so by not indulging in argument until the end of the case, or in your brief.

Mr. Sargent: Mr. Examiner, if you want to get the truth of the matter you might ask the witness to answer the questions, which he hasn't done.

Trial Examiner Moslow: If you want help, you may address me and I will see if I can help you.

Mr. Sargent: Will you instruct the witness to answer the question and not go around the bush?

Trial Examiner Moslow: I will instruct you, Mr. Duke, to try to be as brief and concise as possible.

Q. (By Mr. Sargent) You testified, during direct examination, as to what had happened under Mr. Baumgartner, and then under Mr. Burke, and

(Testimony of George William Duke.)

then under Mr. Hoiles' management of the paper. Is it not true that the only difference that took place, so far as the apprentices were concerned, was the sixth year of apprentices' training was added under the Hoiles' management, and that otherwise it was the same?

A. So far as the law, the international law is concerned, that's true.

Trial Examiner Moslow: That is not answering the question.

The Witness: Within the shop; the training was the same, but we had difficulty in trying to get the apprentices [253] thoroughly trained, because of this situation you have been speaking of, Mr. Sargent; the attempt was made often to put a man on a machine in his fourth and fifth year, in violation of union law. That answers your question, doesn't it?

Q. (By Mr. Sargent) And by violation of union law, you mean section 17, which has been referred to already, that an apprentice must be put on the machine in the sixth year?

A. Yes, sir. That, and there is another stipulation within our law covering that. If there is a '40 book here—section 2, article 7, "Machines" under "General Laws".

Trial Examiner Moslow: What page?

The Witness: Page 103.

Trial Examiner Moslow: Is an apprentice considered a member of the union?

The Witness: No, sir.

(Testimony of George William Duke.)

Trial Examiner Moslow: At what time does he become a member of the union?

The Witness: When he is obligated as a journeyman.

Q. (By Mr. Sargent) When does an apprentice take the oath of office?

A. You mean the oath of membership?

Q. The oath of membership to the International Typographical Union?

A. At the time of the completion of his apprenticeship. [254]

Q. Doesn't he take an oath of allegiance to the union at the end of his first year?

A. He takes an obligation, which is found in the laws.

Q. Look on page 93. A. Page 93.

Trial Examiner Moslow: What section?

The Witness: Section 8, Article 1.

Q. (By Mr. Sargent) In other words—section 8, is it? A. Yes, sir.

Q. He takes that obligation at the beginning of the second year, doesn't he? A. Yes, sir.

Trial Examiner Moslow: Do apprentices attend meetings of the union?

The Witness: Yes, they attend meetings, but are not allowed the privilege of voting.

Q. (By Mr. Sargent) Now, getting back to page 103, to section 2 of article 7, "Machines", it says "In machine offices." Was this a machine office? A. Yes.

Q. "Under jurisdiction of the International

(Testimony of George William Duke.)

Typographical Union." It was under the jurisdiction of the union? A. Yes.

Q. "No person shall be eligible as a 'learner' on the machines who is not a member of the International Typographical [255] Union." Does that include apprentices or not?

A. Yes, that includes apprentices.

Q. "The time and compensation of 'learners' shall be regulated by local unions: provided, local unions may grant permits to apprentices during the last year of their apprenticeship, during which they may learn the machines." Is that what you had reference to? A. Yes, sir.

Q. You take that as a prohibition that they can't learn before? A. Yes, sir.

Q. And you know of no contract where that has been permitted. Is that right?

A. I know of but few contracts altogether in my experience, sir. I don't believe I would be a competent witness on that point.

Q. In other words, you do know of some contracts where apprentices have been put on machines before the last year, don't you?

A. No, sir, I do not.

Q. If I show you such a contract will that change your opinion as to whether exceptions are made in these contracts?

A. It would merely——

Mr. Ryan: Mr. Examiner, I can't see any purpose in that type of cross examination. [256]

(Testimony of George William Duke.)

Trial Examiner Moslow: I will sustain the objection.

Mr. Ryan: I have a further objection to this line of cross examination. It assumes that the point of dispute between the union and the company was as to whether or not apprentices should go on the machines before the last year of their training; whereas, the issues between the company and the union as expressed by the witness, and the previous witness also, was the fact that the company's proposal was to the effect that the company should have exclusive control over apprentices, as to the number and manner of their training. It wasn't specifically directed to the matter of putting them on machines at the end of the sixth year.

Mr. Sargent: You will admit, will you not, Mr. Ryan——

Trial Examiner Moslow: Don't argue between yourselves.

There is no question before me now.

Q. (By Mr. Sargent) Was the question of when the apprentices should be put upon the machines one of the matters in dispute between you and the Register in 1940 and 1941?

A. The main objection, or the main desire on the part of the publisher was to have full control. That would include my answer to your question.

Mr. Sargent: Mr. Examiner, may I have an answer to my question?

Trial Examiner Moslow: I think his answer is responsive.

(Testimony of George William Duke.)

Mr. Sargent: Mr. Examiner, I can't understand how you [257] can say that.

Trial Examiner Moslow: Read the question and the answer.

(The record was read.)

Mr. Sargent: I asked him if one of the questions in dispute was not when the apprentices should go on the machines, and Mr. Brown has testified it was. He doesn't answer my question.

Trial Examiner Moslow: He answers "yes", because, according to his testimony, since the employer wanted control of the entire process, it necessarily included this rule as well. Is that your answer?

The Witness: That is my answer.

Mr. Sargent: The answer to the question is "yes"?

Trial Examiner Moslow: Yes. That is his answer.

Mr. Sargent: All right.

Q. (By Mr. Sargent) Now, you testified with respect to the contract with the commercial printing shops in 1941, I believe March; how many print shops, commercial print shops are there under the jurisdiction of this union?

A. Let me think a moment. Six.

Q. Six. Are there others that are not signed up by you?

A. I believe there were two smaller ones, one man each. There was a reason for our not signing——

(Testimony of George William Duke.)

Trial Examiner Moslow: You weren't asked that.

The Witness: Oh. [258]

Q. (By Mr. Sargent) You say there were eight commercial shops in the community under the jurisdiction of your union, or within the territory covered by your union, and six of those signed is that right? A. Yes, sir.

Q. And that was true, was that true back in March 1941?

A. As I recall, there were six who signed that agreement for the increase in wages.

Q. Has each one of those print shops the right to use the union label, the "bug" today?

Trial Examiner Moslow: What was that word you used? "Bug"?

Mr. Sargent: You are not a printer, Mr. Examiner.

Trial Examiner Moslow: Is that a word indicating the label?

Mr. Sargent: Yes.

The Witness: I don't think it is in all of them.

Q. (By Mr. Sargent) No. As a matter of fact, only four of those six shops are permitted now to use the "bug". Is that right?

A. May I go into detail in answering?

Trial Examiner Moslow: No. Just answer the question as briefly as you can, and if you wish to, your counsel will enable you to make an explanation on redirect examination.

(Testimony of George William Duke.)

The Witness: To the best of my knowledge, yes. [259]

Q. (By Mr. Sargent) You also said that certain newspapers were involved with respect to the 1941, March 1, scale, and you mentioned three newspapers: the South Coast News, of Laguna Beach, Newport News, of Newport Beach, and the Santa Ana Independent, did you not? A. Yes, sir.

Q. Now, those are weekly or daily?

A. Weekly newspapers.

Q. The Santa Ana Register, is that weekly or daily?

A. I think it is still a daily.

Q. Yes. As a matter of fact, the Santa Ana Independent wasn't even doing its own printing at the time? It was hiring out the printing wasn't it.

A. Yes. It hired its printing out.

Q. I ask you whether or not the Orange County News, the Anaheim Bulletin, the Fullerton News Tribune, are daily newspapers in Oange County?

A. To the best of my knowledge they are.

Q. Had any of those papers adopted this scale which you had put into effect on March 1, 1941?

Mr. Ryan: I object to that question as immaterial and irrelevant, incompetent.

Trial Examiner Moslow: Objection overruled.

The Witness: Mr. Sargent, those newspapers are outside of our jurisdiction. [260]

Q. (By Mr. Sargent) They are all in Orange County, and they are competing papers of this paper?

(Testimony of George William Duke.)

A. There is jurisdiction in the northern part of the county and jurisdiction in the southern part. Santa Ana Typographical Union has jurisdiction over the southern half.

Q. Do you know whether or not these papers were signed up with any union, a co-local of yours, on this wage scale?

A. Not on this wage scale. It was outside of our jurisdiction.

Q. Well, you have a local which does have jurisdiction over these, do you not? A. Yes.

Q. And you know these papers compete with the Register, don't you?

A. No, not in Santa Ana they don't.

Q. They compete in the general territory, both as to—particularly as to national advertising, don't they?

A. I do not know. You are asking me something I can't reply to.

Q. Assuming, for the moment, that they do compete with this paper as to national advertising or otherwise, do you know whether any one of these papers is today paying lower or higher wages for printers than the Santa Ana Register?

Mr. Ryan: I object.

Trial Examiner Moslow: Objection overruled.

[261]

The Witness: I understand the wages are lower in Fullerton, Anaheim, and Orange; all three.

Trial Examiner Moslow: Lower than the Register?

(Testimony of George William Duke.)

The Witness: Yes, sir.

Mr. Ryan: I object again. The answer is a statement of understanding and not a statement of fact. Why encumber the record with understanding and assumption?

Mr Sargent: Mr. Examiner, I don't blame Mr. Ryan for objecting to the thing, because it hurts his case badly. If I were in his shoes I would too.

Trial Examiner Moslow: I have overruled his objection. Let us proceed.

Q. (By Mr. Sargent) Do you know whether it was the case, that is, that these wages on these three papers were lower in 1940 and up to the date of the strike in 1941 than the corresponding printers' wages in the Santa Ana Register?

A. You said "do you know." I do not know.

Q. Do you have an understanding on it?

Mr. Ryan: I have a standing objection to this line of questions.

Trial Examiner Moslow: Are you reasonably certain they are lower?

The Witness: I am reasonably certain they are.

Trial Examiner Moslow: All right. Proceed.

Q. (By Mr. *Ryan*): Now, except for the time when you testified [262] to the conversation of January 15, 1941 with Mr. R. C. Hoiles, when you mentioned each time prior to this, you were referring, were you not, to C. H. Hoiles? A. Yes, sir.

Q. Isn't it true that each one of the weekly papers which you suggest as coming short of the

(Testimony of George William Duke.)

scale of March 1, 1941, also had in connection with the printing shop, a commercial shop?

A. Commercial shop?

Q. Is that right? A. That is right.

Q. And does the Santa Ana Register have a commercial print shop?

A. It did not at the time I left its employ.

Q. Do you know whether it has gotten one since?

A. No, sir, I do not.

Q. Now, in those four print shops which you testified had signed, tell me how many printers in each one of those shops there were, if you know.

A. I do not know exactly. I would say—in all the six or in the four which you are speaking of?

Q. Isn't it true that each one of these just has one printer in each one commercial print shop?

A. No; some of them have two or three.

Q. Other than the man who owns the shop himself, and who [263] would be deemed the owner; only one employee outside of the owner?

A. I know in the South Coast News there were several employees at one time, when the Santa Ana Register was printed there. Several men drove from Santa Ana and worked there regularly. Also the Santa Ana Print Shop at the present time has more than one. It has about four employed.

Q. Which one is that?

A. The Santa Ana Printing Company, which is one of the commercial shops.

Q. Now, let us come to the meeting of the union on April 30, 1941. I believe you testified on direct

(Testimony of George William Duke.)

that when the union met you were present and the union reviewed the differences between the respondent and yourself. Is that right?

A. I so testified, yes.

Q. And you testified that there was no agreement as to a written, signed agreement?

A. That is correct.

Q. Now, during the time of your negotiations in 1940 and 1941, had there ever come a time when you were in complete accord in your negotiations, so that a meeting of the minds resulted on all problems?

A. No, there was never a time like that.

Q. So that there never had come a time, in either 1940 or 1941, when you could write out a contract and sign it and [264] say "This is the agreement of the parties". Is that right?

A. That is correct.

Q. Referring to Board's Exhibit 5 in evidence, a letter to Mr. Seth Brown under date of April 26th, four days before the strike, by Mr. Hoiles, "Also, we are to have complete control of the number and work of our apprentices, as we see fit for efficient operation of our plant."

Did you interpret that as meaning that the paper was trying to control the educational course of the apprentices? A. We simply knew that——

Q. Go ahead and finish.

A. We simply knew that the request was in violation of our law, and we could not accept it, and we didn't discuss whether it was a request on the

(Testimony of George William Duke.)

part of the employer to take over the educational part or not. We knew, as stated, it was illegal for us to consider it.

Q. Well, now, let me come back to my question of a minute ago. Did you interpret this as meaning an effort on the part of the management to take over the actual training of the educational course of the apprentices?

A. You mean by that the experience within the shop?

Q. No. I am talking about the educational training of apprentices.

A. You mean the I.T.U. lessons?

Q. Yes. [265]

A. We did not attempt to interpret it. We simply, directly answering you: No, we did not interpret it that way, because we felt as it stood we could not accept it. The attempt to control—have the full control, was all we considered.

Trial Examiner Moslow: Were these lessons given in the shop or elsewhere?

The Witness: They are given elsewhere. They are handed to the apprentices and he does the work in the shop, sometimes, where necessary; he does the work in the shop and attaches it to the lessons and sends it in.

Trial Examiner Moslow: It is sort of a correspondence course?

The Witness: Yes.

Q. (By Mr. Sargent) There had been up to that time no effort on the part of the management to at-

(Testimony of George William Duke.)

tempt to take over the instruction of apprentices?

A. No.

Q. In other words, you understood at the time that what the management was trying to do was to have more than three apprentices, and also they wanted to have more control over the work of the apprentices in the management's composing room. Is that right? A. No.

Mr. Ryan: I object to the manner of cross examination in that it is argumentative. The witness has already [266] stated what the union understood the proposition to mean, in the letter.

Trial Examiner Moslow: I will overrule the objection.

Q. (By Mr. Sargent) You did understand, Mr. Duke, that there was a dispute as to the number of apprentices, didn't you?

A. May I go into just a little detail in answering this question, without saying yes or no? I will say "yes," due to the fact that the office asked for full control of the apprentices. We knew that meant unlimited apprentices which would mean, of course, the number.

Q. In other words, during the period of negotiations in 1940 and 1941, the question of the number of apprentices which the union would agree to permit in the employers' composing room was one of the matters in dispute, wasn't it?

A. Not any special number; just unlimited numbers; whether it should be limited or not be limited.

(Testimony of George William Duke.)

Mr. Sargent: Read the question again, please.

(The question was read.)

The Witness: No. It was a question as to whether the numbers should be limited or not.

Q. (By Mr. Sargent) Did you ever offer to put four or five apprentices, instead of three, in the employer's composing room?

A. We did not. [267]

Q. No. And when the management says it wants complete control over the work of the apprentices, you knew, did you not, that that applied primarily to whether or not the apprentices could operate on the machines before the sixth year?

A. It meant that.

Q. Yes.

A. And, Mr. Sargent, it also mean that, as was the case with one apprentice, he was not allowed to do anything except bank work for three full years. That is, galley dump work.

Q. Who was responsible for that?

A. Certainly not the union.

Q. Was the management controlling the apprentices, then, in that letter?

A. The foreman and the union, working together, are supposed to try to get the apprentices around, but the union always had difficulty in the last four or five years in getting those apprentices around to all the different parts of the shop. When they would be found proficient on the floor they would stay there all the time clear up until the time of their initiation as members of the union.

(Testimony of George William Duke.)

Q. In other words, the union wanted the apprentices to do one thing and the management wanted them to do another thing?

A. We wanted them to do all things in the shop.

Q. Well, now, who directs, in an average composing room, [268] what a particular apprentice is going to do? The union or the foreman?

A. Where there is a union contract that is regulated by the foreman of the chapel representing the union.

Trial Examiner Moslow: What does the term "chapel" mean? Is that the shop committee?

The Witness: That is the entire membership of the force.

Trial Examiner Moslow: It is a subdivision of the local, then?

The Witness: Yes, sir.

Q. (By Mr. Sargent) In the particular plant. Is it your position that what an apprentice does from day to day should be directed by the chairman of the chapel rather than by the foreman?

A. The position he would take would be the same as the international union provides; normally, there should be a committee representing both employer and the union, which would have joint control over this matter. We were never able to put that into effect in the Santa Ana union.

Q. I have negotiated contracts where such a committee is in effect; but there wasn't any provision for such a committee in this particular contract, was there?

(Testimony of George William Duke.)

A. Not in the contract.

Trial Examiner Moslow: Which contract are you referring [269] to now?

Mr. Sargent: The verbal contract existing up to the time of the strike.

Q. (By Mr. Sargent) There was no provision in that verbal contract in regard to a plant committee?

A. Indirectly, because the international laws are made a part of every contract; that's agreed to.

Q. That is a recommendation, not a mandatory provision?

A. It is so provided in the contract, but not signed.

Trial Examiner Moslow: What is that regulation?

The Witness: That international laws be made a part of the contract.

Trial Examiner Moslow: That was one of the terms?

The Witness: That was one of the terms.

Q. (By Mr. Sargent) Can you find in the international law whereby it is mandatory to have such a committee set up in the contract between the local and the employer?

A. It is recommended.

Q. You weren't going to say that because it is recommended it is a mandatory regulation of the international, were you? A. No.

Q. In the absence of a provision, practically, was it the chairman of the chapel or the foreman who

(Testimony of George William Duke.)

was directing the apprentice, who said what he should do upon any given day?

A. Repeat that, please. [270]

Trial Examiner Moslow: Read the question.

(The question was read.)

The Witness: The foreman always directed the activities of the apprentice in the composing room of the Santa Ana Register.

Q. (By Mr. Sargent) And that was something where the union wanted some other procedure adopted and the management wanted to keep that procedure in effect. Is that right?

A. The union simply wanted to have the laws and regulations of the union lived up to. We had various arguments over that. Yes, there was conflict of opinion on that.

Q. The union wanted to have the chairman of the chapel or its committee control what the apprentice should be doing; and the management wanted to have a continuation of the procedure whereby the foreman of the composing room directed what they should be doing? Is that right.

Trial Examiner Moslow: I don't understand. Are you talking about what they wanted before negotiations, or in the course of negotiations?

Mr. Sargent: The situation as it existed on April 30th, when he took up the matters with the union, that was the time when the die became cast one way or the other. I am trying to get the condition in the employer's composing room at the time this meeting took place. That is right.

(Testimony of George William Duke.)

I asked him the question to determine what each was [271] trying to do and what the condition had been. He has testified the foreman was directing, and I have asked him now whether that was what the management wanted to continue, and the union wanted to have either the foreman of the chapel or a committee determine what the apprentices should be doing.

That is correct, is it not, Mr. Duke?

The Witness: Yes. The foreman of the chapel we thought should have more control of the apprentices than he at present had.

Q. (By Mr. Sargent) Yes. And the management said they wanted to keep the control which they had through the foreman. Is that right?

A. Well, it was not debated, that particular item especially.

Q. Now, take your next situation; you say that the management had proposed that there be no discrimination between the union and non-union members, and I believe you also said that arose during one of the earlier April meetings, I believe April 3, 1941. Is that correct?

A. I remember that a proposition stating that request on the part of the employer was made.

Q. You do not remember whether it was the April 18th. Now, early in April, 1941 the management had suggested to you that there be no further discrimination between union and non-union members. Is that right?

(Testimony of George William Duke.)

Mr. Ryan: I object to the form of the question. [272]

Q. (By Mr. Sargent) I am simply trying to get the fact out. You tell us what the question was that you discussed before the union that time on April 30th, before the strike. What proposal of the management was there which related to union or non-union employees?

A. It was mentioned among the other grievances that we had against the Register Publishing Company.

Q. I thought you said that the management as a part of its seven proposals in 1940 had suggested there be no further discrimination in regard to union or non-union employees? Didn't you say that?

A. Yes. Weren't you asking me what we did at the union meeting of April 30th?

Q. What did the management then propose in 1940 with regard to this matter in its seven proposals?

Trial Examiner Moslow: In other words, give us more detail about this suggestion. What does it mean?

The Witness: That simply means that they could not hire at will union and non-union printers. In other words, that we would lose our rights as the bargaining agents for all of the members, or the people who worked in the composing room of the Register.

(Testimony of George William Duke.)

Q. (By Mr. Sargent) Is that what the management said at that time?

A. They stated in their seven points that they wished no [273] discrimination between union and non-union printers.

Q. In other words, the paper wanted to be able to employ union or non-union members, whichever they wanted to employ?

A. We gathered that was their request.

Q. Did they tell you in their negotiations what they meant by this proposal?

A. We simply notified them of the action of the union in refusing them, and that—I don't believe we mentioned that particular phase in our negotiation meeting.

Q. Mr. Duke, what I am trying to find out is what the difference between you and the management was with respect to this. Before you turned it down, you must have known what the proposal of the management was.

A. They wanted it; we didn't want it. That is the only difference I can discuss.

Q. Was it your understanding that this proposal of the management meant that it could employ union or non-union labor as it saw fit, regardless of whether or not they happened to have a card in the Typographical Union?

A. That was our interpretation of their request.

Q. Did Mr. Hoiles during either the negotiations in 1940 or 1941 say that is what he meant by the proposal? A. He did not clarify it.

(Testimony of George William Duke.)

Q. And you didn't ask him?

A. No, sir. [274]

Trial Examiner Moslow: Were there any other union men working for the respondent, other than the printers?

The Witness: Yes; there were stereotypers and pressmen.

Trial Examiner Moslow: Anyone else?

Mr. Sargent: Mailers?

The Witness: No mailers.

Trial Examiner Moslow: The rest were all——

The Witness: All clerical help and reporters, and office help.

Trial Examiner Moslow: All the technical men, then, were union men?

The Witness: Yes, sir.

Trial Examiner Moslow: How about the mailers?

The Witness: I don't believe they were organized.

Q. (By Mr. Sargent) How many stereotypers were in there?

A. Two full time; not full time, no. There was one full time and one man who worked two or three days, I guess.

Q. They were both union members?

A. Yes, sir.

Q. How many pressmen?

A. One pressman and one assistant.

Q. Were they both union members?

A. Yes, sir.

Q. All right. Now, you had no further dis-

(Testimony of George William Duke.)

cussion with Mr. Hoiles, the management, with respect to other than what you [275] have given here, as to what was meant by that clause in their seven proposals, did you?

A. Simply to inform him that we rejected it. That's the only discussion we had.

Q. All right. I understood you to say on direct examination that the question had arisen during the 1940 negotiations. Is that right? The time when the seven proposals were offered by the management?

A. I said that, and I believe I also said it arose in 1941 again.

Q. When did it arise again in 1941?

A. I do not remember the date.

Q. The only reference I have from the direct testimony is you said when the management discussed what it would do, as a result of the management's letter of April 26th, that the union, in reviewing the matters, said: This is one of the matters that stands between us. Was there any mention other than that one mention in 1941?

A. I remember distinctly that it was presented in 1940, written out in a list.

Q. Yes. Isn't that the only time——

A. I am not clear as to how it was presented. It stays in my mind that we discussed it especially in our union meeting in 1941.

Q. But, as far as you can recall, there was no discussion [276] between you and the management in 1941 with regard to that matter?

(Testimony of George William Duke.)

Trial Examiner Moslow: Discussed what?

A. I have already so testified.

The Witness: That there was no discussion on that particular point, except we refused.

Q. (By Mr. Sargent) Now, you testified that one of the things which was brought up by the management in 1940 was the question of paying straight matter men a lesser rate, that is, 75 cents an hour, instead of $1.00 an hour. You recall having testified to that? A. Yes.

Q. Now, that was something which had never come in for discussion in 1941 meetings. Isn't that so? To reframe my question, which is a little bit ambiguous, isn't it true that this question of paying straight matter men a lesser rate than the average journeyman printer did not arise in the 1941 negotiations?

A. No, it was discussed in the 1941 negotiations.

Trial Examiner Moslow: Was or was not?

The Witness: It was.

Q. (By Mr. Sargent) What time was this discussed in 1941?

A. In one of the negotiations. I can't state just exactly which one. We discussed the merits of it, pro and con.

Q. If I am correct in my recollection, there were only two [277] negotiational meetings in 1941. One, the meeting of——

A. You are referring to my testimony?

Q. Yes. So far as your testimony, one meet-

(Testimony of George William Duke.)

ing was April 18th, and one the 26th, although Mr. Brown did have a meeting April 3, 1941.

A. Mr. Sargent, if you will recall, we straightened out that matter of the date of this letter, and recalling that that letter was written on or before April 3rd, there was a meeting the first week of April.

Q. Let us assume there were three meetings. I ask you if you can recall whether or not the subject of lesser compensation for straight matter men was discussed at any one of the three April meetings? A. I am sure it was.

Q. It couldn't have been discussed at any great length, could it, or you would have remembered it?

A. It was brought up as being objectionable to the union.

Q. It was simply a left-over from the 1940 negotiations? A. Yes; it was still unsettled.

Q. In other words, it was one of those things in abeyance, after a lapse of some ten months, between the 1940 negotiations and the 1941. Is that right?

A. It was something we had taken no action on definitely.

Q. Yes. Now, there was one other thing which you testified on direct, that was considered at the time when the union [278] voted a strike, and that was that a man shouldn't be hired for less than a full day. Had that been discussed during the 1940 or 1941 meeting?

A. It was discussed both years.

(Testimony of George William Duke.)

Q. And was that of the same category as the straight matter pay, something that was hung over from the 1940 negotiations?

A. Something we had not been able to agree on.

Q. Was there any detailed discussion in the 1941 negotiations?

A. We discussed the matters pro and con.

Q. And you could not agree upon that?

A. Could not agree on it.

Q. Now, isn't it true that the chief matter of concern, the chief difference of opinion was with regard to the two things set forth in the company's letter, Board's Exhibit 5 in evidence, with respect to the suggested weekly increase in pay of two and one-half dollars at the same hourly rate, which the management offered, and also the question of the number and work of all apprentices? Those were the two things, were they not, which were most in your mind at the time the strike was voted?

A. All of those matters entered into our vote; those two things were relevant to it. They were important, but not the most important.

Q. What was the most important, in the union's mind, at that [279] time, Mr. Duke?

A. The fact that we could not reach any agreement with the Register Publishing Company on all matters with which we had been attempting to negotiate with them: a signed contract; full control of apprentices; the straight matter men at 75 cents an hour; the hiring of union or non-union men in-

(Testimony of George William Duke.)

discriminately; the various other things I mentioned in my testimony previously.

Q. Now, the union felt very strongly upon each one of these matters which you have mentioned, did it not?

A. It could not consider any of them as being legal for us to adopt.

Q. In other words, the only one of all those things which the union could yield on was the question of wages. Isn't that true?

A. I don't understand your question, Mr. Sargent.

Q. I understood you to say that all the rest of them were non-negotiable, because you believed the International wouldn't permit you to do anything except take the position which you had taken. Isn't that so? A. Yes.

Q. So that the only thing which you could have negotiated on with regard to was the question of some adjustment of wages, isn't that so?

A. The price per hour. [280]

Q. The price per hour, yes. And when you came to submit to the management or to suggest to the management that it arbitrate, or that it have a Federal Conciliator in, at that time you had in mind that you would have to secure a concession from the management on these other points entirely in your favor, and that the only matter which could be subject to conciliation, therefore, would be the question of how much should be paid per hour. Is that right?

(Testimony of George William Duke.)

A. If you mean by "conciliation" reaching an agreement, no; because we felt that all these other matters needed to have an agreement reached upon them between us, an understanding that we would abide by union law rather than by the requests made.

Q. Did you offer in your arbitration, or with Mr. Fitzgerald, the Federal Conciliator, to arbitrate or conciliate as to any of the other matters except wages?

A. I can't answer. I was in Los Angeles at that time.

Q. From what you know of the picture, would the union have been willing at the time of the strike in April 30, 1941, to have yielded on any of the other points except wages?

Trial Examiner Moslow: I cannot allow that question. It is so speculative. This witness wasn't there.

Mr. Sargent: Oh, he was there at the time of the meeting.

Trial Examiner Moslow: You asked him would the union have [281] yielded.

Mr. Sargent: He was at the meeting. He was president of the union. When the labor conciliator was suggested he was there.

Trial Examiner Moslow: You are asking him did they reveal at the meeting of April 30th that they would yield?

Mr. Sargent: That is correct. The time of the strike.

(Testimony of George William Duke.)

Trial Examiner Moslow: Read the question again.

(The question was read.)

Mr. Ryan: I object. I understood him to ask: Would the union have been willing to yeild.

Mr. Sargent: I asked him if the union would have yielded.

Trial Examiner Moslow: I will sustain the objection.

Mr. Sargent: But, Mr. Examiner, this is the very heart of the whole negotiation.

Trial Examiner Moslow: How is he going to determine whether they would have yielded unless the matter was brought up?

Mr. Sargent: Because he was present at the meeting when they discussed these things and reviewed the entire history. If anybody would know, this witness would know what the attitude of the union was.

Trial Examiner Moslow: How could he have foretold the attitude unless there was a vote on it?

Mr. Sargent: I am going to ask him. [282]

Trial Examiner Moslow: Let us proceed.

Q. (By Mr. Sargent): Were you present at a meeting of April 30th when the union discussed the situation as to whether it would strike or not?

A. Yes.

Q. Before the union took a strike vote did it discuss the various things to which you have testified?

A. Yes.

(Testimony of George William Duke.)

Q. With respect to the various points in controversy?

A. They were all considered jointly.

Q. Yes. Now, at that time, on April 30, 1941, at that union meeting, did the union demand, say or take the position that it would yield on any of the matters except wages in order to reach an agreement with the company?

A. You mean, was there a vote on that question?

Q. Was there an expression of the union either by voting or otherwise?

A. No expression by voting.

Q. Well, did the union take any expression by a resolution or by any other action which would indicate it would yield on any one of those points in order to reach an agreement with the respondent?

A. You are asking me something that I do not know, because there was no action taken in the form of a resolution or a vote. I don't know what the individual wishes of the members might [283] have been on that subject, because they were not stated.

Q. Was there any expression on the part of the union membership as to which one of these particular matters it deemed most important?

A. I testified a moment ago they were all considered and acted upon jointly.

Q. Would the Typographical Union laws have prevented their yielding upon every point except that of wages?

Mr. Ryan: I object. The laws are set forth in

(Testimony of George William Duke.)

the constitution, which is in evidence, and speak for themselves.

Trial Examiner Moslow: I will overrule the objection. Let us ask specifically. Did your laws prevent you from arbitrating the question of apprentices?

The Witness: My belief is that it would prevent us from arbitrating the question of a law of the International Typographical Union. I will answer that clearly. We are prevented from arbitrating a law under the International Typographical Union.

Q. (By Mr. Sargent): Would it have prevented you from arbitrating with respect to the question of less pay for straight matter men?

Trial Examiner Moslow: Where do you see that in the laws, by the way? You said it is forbidden by the laws.

The Witness: Just a moment. Section 2, Article 2, of the General Laws. [284]

Trial Examiner Moslow: Section 2, Article 2, page 96. The question I will ask you is: Where is there anything in the laws that relates to a definite rate for straight matter men?

The Witness: There is no such provision.

Trial Examiner Moslow: Then, could that matter have been arbitrated?

The Witness: No, sir.

Trial Examiner Moslow: Why not, if there is no provision in the laws preventing its arbitration?

The Witness: You mean: Why not arbitrate the

(Testimony of George William Duke.)

question of having some journeymen work for less than the minimum scale?

Trial Examiner Moslow: Was there anything in the laws which forbade you to have one scale for straight matter and one scale for other types of work?

The Witness: Yes, there should be a minimum scale which covers all employees in the composing room.

Trial Examiner Moslow: That is the law I would like to look at. Can you find that?

The Witness: I think so.

Trial Examiner Moslow: That section specifically states they are not subject to arbitration?

Mr. Sargent: Which one is that?

Trial Examiner Moslow: The one he just cited to me. The laws themselves provide it is not subject to arbitration. [285]

Mr. Sargent: That has anything to do with the laws? What section was that?

Trial Examiner Moslow: Page 96.

The Witness: I can't find it now.

Trial Examiner Moslow: If you find it later, advise Mr. Ryan.

The Witness: All right.

Trial Examiner Moslow: Let us proceed.

Q. (By Mr. Sargent): What other of the matters between you, the union and the company, Mr. Duke, were not subject to arbitration?

A. The full control of apprentices.

Q. We talked about apprentices. We have had

(Testimony of George William Duke.)

the question of straight matter men. What about this particular proposal that a man couldn't be hired except for a full day? Was that a matter——

A. That is a law.

Q. In other words, you couldn't arbitrate that, could you? A. No.

Q. In other words, if a man is called in for a half day's work, he has got to be paid a full day under the I.T.U. law?

A. I understand that is the law.

Q. And you couldn't arbitrate that, then?

A. No.

Q. About the only thing you could have arbitrated, then, [286] would have been the question of salaries. Is that right? Wage rates?

A. If you mean so far as actually placing those matters in the hands of a third party—arbitration, you mean, or conciliation?

Q. Yes. A. I think that is correct.

Q. And when you suggested, you or Mr. Brown in your presence suggested on several occasions there might be arbitration or conciliation of those things, on none of those occasions did you ever tell the management that you could arbitrate or conciliate on anything other than wages?

A. On any of these proposals other than wages?

Q. Yes. Now, what was the real reason as to why the union was unwilling to have its members in respondent's composing room work an extra two and one-half hours per week for an increase in

(Testimony of George William Duke.)

weekly wage at the same hourly rate of two and one-half dollars a week?

A. What was the reason?

Q. Yes.

A. Because that was stated in this fashion: That we would have five seven-hour days, and one five-hour day, and we objected to having more than five full days of employment.

Q. In the letter, Board's Exhibit 5 in evidence, the letter of April 26, 1941 by Mr. Hoiles to Mr. Brown: "Namely, we [287] are willing to allow our printers to work 40 hours a week, instead of 37½, at the same rate they are now getting of $1.00 an hour. This will give them a weekly increase of $2.50, or approximately $130 a year."

Now, that final proposal said nothing about whether it would be five or six days a week, did it?

A. That had already been discussed before.

Trial Examiner Moslow: When?

The Witness: In 1941.

Q. (By Mr. Sargent): And if it had meant not to exceed eight hours per day, five days a week, or a total of 40 hours, would you have been willing to accept it then?

A. Mr. Sargent, in our law, in answer to your question, in our verbal agreement the Register had a perfect right to go to five days a week, eight hours a day, any time it gave us two weeks notice in writing.

Q. Then, you would have had no objection if

(Testimony of George William Duke.)

the proposal of the management had meant five eight-hour days per week, would you?

A. We would have agreed to that.

Q. Did you ask the management when the April 26th letter came, whether it meant there was going to be five days at eight hours or six days with a shorter day at the end? Did you ask the management that?

A. We had already discussed those things before. [288]

Q. After all this was the final proposal upon which you voted your strike?

A. We deemed it a restatement of their position, just as they also restated their position on the apprenticeship question.

Q. You didn't know at the time whether the management was limiting it to five or six days a week, other than you had had negotiations previously in the month about it?

A. We had a very good understanding of what it meant.

Q. One more question in regard to this: At any time after receipt of the letter of April 26th from the management, did you, or to your knowledge did any other member of the union ask the management whether the 40 hours were to be worked in five or six days of the week?

A. No, we did not.

Q. Now, what was your idea about whether cordial relations had existed between the union and

(Testimony of George William Duke.)

the company during the years 1940 and 1941, up to April 3rd?

A. My idea was that it was exactly the opposite.

Q. That there weren't cordial relations? Is that right? A. True.

Q. Now, I show you a letter, Respondent's Exhibit 1 for identification, written on April 3, addressed to Mr. C. H. Hoiles, Santa Ana Register, signed "Santa Ana Typographical Union, 579, George W. Duke, President." Did you sign that [289] letter? A. Yes, sir.

Q. And did you read the letter before you signed it? A. Yes, sir.

Q. Did you prepare the letter?

A. Yes, sir.

Q. You said on April 3, 1941: "The cordial relations existing between yourself and the union men in your employ should give you great satisfaction in these days when there is so much strife between employers and employees. We trust that this feeling of partnership may continue and be strengthened." Did you mean that or didn't you when you wrote it?

A. That was a diplomatic letter, attempting to smooth over the difficulties in the past. We thought by bringing such a conciliatory attitude we would start negotiations on an even scale again, with a chance of having them ironed out. It was a matter of diplomacy. That was about the same time as the Munich conference in England.

(Testimony of George William Duke.)

Q. In other words, you were engaging in appeasement? A. Yes, sir.

Q. And you didn't mean what you wrote in that letter?

A. I meant that would be our wish.

Trial Examiner Moslow: The Munich conference didn't take place in 1941. [290]

The Witness: '38. I had it in mind.

Q. (By Mr. Sargent): Let me see if I have your attitude clearly. I don't want to get it except as you give it to me. Am I correct in my understanding that you didn't actually believe what you wrote here, but that you said it because you thought it might create better feeling on the part of the paper?

A. I thought it might help to erase some of the difficulties we had been having in the past.

Q. In truth, you felt there were not cordial relations? A. How could we feel that way?

Trial Examiner Moslow: Just answer the question without arguing.

Q. (By Mr. Sargent): In your mind you knew there were not cordial relations between the paper and the union men? A. Yes.

Q. And that instead of there being great satisfaction, if the truth were known, there was a ground for dissatisfaction with the relationship? Is that right?

A. I deny there was ground for dissatisfaction.

Trial Examiner Moslow: Was there dissatisfaction?

(Testimony of George William Duke.)

The Witness: There was dissatisfaction.

Q. (By Mr. Sargent): There was dissatisfaction, and that dissatisfaction was on the part of the union men with the paper. Is that right? That is, the dissatisfaction that [291] existed, you say was a dissatisfaction of the union men against the paper. Is that right? A. I did not say so.

Q. I am asking you, is that what you meant? Or did you mean the management had a right to be dissatisfied as against the men in its employ?

A. I meant in my remarks that the attitude of the paper definitely was one of dissatisfaction, in those editorial columns, and we were attempting to erase any ill feeling that may have been engendered by these editorials, and by our reaction to them; it would be a conciliatory move on our part.

Q. Then, there was no dissatisfaction of the union men with the paper, but the dissatisfaction was on the part of the paper with the union men. Is that right?

A. That is the way we saw it, yes.

Q. It is a fact, isn't it?

A. I believe it is a fact.

Trial Examiner Moslow: I don't understand the answer. What is a fact?

The Witness: We gathered from the various editorials, sharp criticism directed by this person, mentioning us by name in the editorial columns of the paper that there was general dissatisfaction with our being there.

Q. (By Mr. Sargent): You didn't mean to in-

(Testimony of George William Duke.)

dicate, did you, by your answer to the Examiner's question, that any person a [292] member of the union was mentioned in the editorials?

A. The union itself was mentioned: "Printers in my employ," was one of the terms mentioned.

Q. No individual printer was mentioned by name, was he? A. Oh, no.

Q. This is the only ground, in your mind, that shows dissatisfaction on the part of the paper with the union or its members. Is that right?

A. That, and its refusal to come to an agreement with us in our negotiations in the year past.

Q. Let us limit ourselves now to 1941. When you wrote this letter you testified you thought there was dissatisfaction on the part of the management with the union and its members, and I asked you whether or not your ground for this was the editorials written in the paper?

A. That was one of the grounds, I believe I testified.

Q. I see. You felt that the management shouldn't express itself in its editorial columns with respect to union matters? Is that right?

A. When the opportunity was always present to discuss them with us personally, we felt aggrieved over the fact that—using a slang expression—the dirty linen was hung out for the public to admire.

Q. In other words, you felt Mr. R. C. Hoiles' remarks should have taken place in the composing room, anything he [293] had to say about the union

(Testimony of George William Duke.)

or the membership, should be taken up with you people individually, or with the negotiating committee, rather than that there should have been a comment in an editorial?

A. We felt that would have been better, yes.

Q. Isn't it true that the editorials touched upon a great many labor matters generally?

A. Yes. It also touched specifically on many.

Q. The word "editorial" covered the whole realm of labor relations, didn't it?

A. Yes, sir, and then some.

Q. Did you ever write to the paper objecting to any of those editorials?

Mr. Ryan: I object to that as immaterial.

Trial Examiner Moslow: I will sustain the objection. Was there any obligation to write, Mr. Sargent?

Mr. Sargent: No. But if the management turned him down, that would have been indicative of something. However, I simply asked him did he ever write and object to this practice.

Trial Examiner Moslow: Suppose he did. What difference would it make?

Mr. Sargent: If the management turned him down and said: No, you can't object, that would have been one thing——

Trial Examiner Moslow: I don't consider it material, but I will allow you to answer. Did you ever write? [294]

The Witness: No, sir.

Q. (By Mr. Sargent): You never made a com-

(Testimony of George William Duke.)

plaint either to the management, either by writing, or otherwise, that it shouldn't print these editorials, did you?

A. No, sir. It was mentioned to Mr. Hoiles personally.

Q. By you? A. Yes.

Q. In other words, you told Mr. Hoiles that he shouldn't print these editorials about labor unions. Is that right?

A. Yes, I told him—no, wait a minute. I told him I felt his sharp criticism of us was unjust.

Q. Did you seek to give him a reason why you felt they were unjust. A. Many times.

Q. Did he listen to you?

A. Yes, and I listened to him.

Trial Examiner Moslow: Is this the elder Mr. Hoiles?

The Witness: R. C.

Q. (By Mr. Sargent): Now, you have been talking about Mr. R. C. Hoiles. Is that right?

A. Yes.

Q. After one of these discussions neither one of you was convinced, is that right? A. Correct.

Trial Examiner Moslow: How much more do you have? [295]

Mr. Sargent: Oh, a few things more.

Trial Examiner Moslow: Proceed. We will recess for five minutes.

(A short recess was taken.)

Trial Examiner Moslow: The hearing will come to order.

(Testimony of George William Duke.)

During an off the record discussion it has been agreed that there will be no session here on Saturday. This was done at the request of Mr. Sargent, and also because the custodian of the building tells me we will have to be out of the building by 12:00 o'clock. We will try to sit a little later tonight, and sit a little later Monday.

Proceed.

Q. (By Mr. Sargent): Mr. Duke, at no time were you ever refused space in the paper to answer any editorials which you or the union might object to?

A. I didn't ask for any; no, I was never refused.

Q. Did you mean to indicate on your direct testimony that the picket lines had been established around this plant continuously ever since April 30, 1941 to date?

A. I could not say one way or the other that they had been. It was my understanding that they had been maintained from that time until now.

Q. Don't you know that days have gone by when there hasn't been a picket there?

A. No, sir, I don't know that. [296]

Q. There have been many days when you haven't been there to see the plant for days at a time. Is that correct? A. That is correct.

Q. You are aware there have been no picket lines around there the past few days, are you not?

A. That I am not sure of.

(Testimony of George William Duke.)

Q. Now, you say that you had a talk with Mr. Hoiles on the morning of May 1st. Is that right?

A. No. I wish to correct that. It must have been a day later. I will repeat my evidence that there were many men in the composing room. I have been told the next day there were very few in there, so it must have been the second day then.

Q. As a matter of fact, do you know whether any employees were hired the following day by the managament? A. I do not know.

Q. Do you know from your information of the situation that the executives got out the paper without employing anybody the following day?

A. I remember the Santa Ana Register was published May 1, 1941.

Q. Did that paper say the executives got it out without any outside people being employed?

A. I remember articles which so stated.

Q. As a matter of fact, even the metropolitan papers in [297] Los Angeles, several of them, so stated in their newspaper columns, didn't they?

Mr. Ryan: I object to that as incompetent and irrelevant.

Trial Examiner Moslow: Objection sustained.

Q. (By Mr. Sargent): You wish to withdraw your testimony that on May 1st there were 15 additional employees there?

A. Yes. I will say that was a day or so later.

Q. Did you go inside at the time?

A. I went into Mr. C. H. Hoiles' office, yes.

Q. Did you go through the picket line?

(Testimony of George William Duke.)

A. I was permitted to.

Q. Now, in your conversation with Mr. C. H. Hoiles just after the strike had been voted by the union, on the night of April 30th, you had such a conversation with him, did you? A. Yes.

Q. And you notified him that the union was going to strike beginning 7:00 o'clock the following morning? A. Yes.

Q. That the night men would continue to work their shift? A. Yes.

Q. As a matter of fact, the night men were paid for that shift, were they not, prior to their going to work on that shift? A. Prior to that?

Q. Yes. [298] A. What night was that?

Q. The 30th.

A. I believe that may be true, since pay day usually came on the last day of the month.

Q. Yes. Now the night men did go off the job, did they not? A. Yes.

Q. About 11:00 o'clock that night?

A. Yes.

Q. Had there been any argument with you, with Mr. Hoiles, when you notified him the strike was on, that he wouldn't get any outside people to help out? A. No.

Q. No. In spite of the editorial policy to which you say you and your union took exception, the management's attitude toward you had been very friendly, had it not?

A. What do you mean by their attitude toward me? Their personal relations with me?

(Testimony of George William Duke.)

Q. Yes. A. We were on speaking terms.

Mr. Ryan: I object to the question as immaterial.

Trial Examiner Moslow: Objection overruled.

Q. (By Mr. Sargent): Isn't that true, Mr. Duke?

A. We had speaking relations, if that is what you mean, yes.

Trial Examiner Moslow: You said "we". Do you mean you?

The Witness: Between Mr. C. H. and Mr. R. C., also. [299]

Q. (By Mr. Sargent): Wasn't there a friendly relation between you and them?

A. We tried to maintain such a relation to the best of our ability, yes.

Q. I am asking you whether, between you, George W. Duke, and the management, there wasn't a cordial and friendly relationship?

A. I believe that both sides tried to maintain a personal relationship there that was all right.

Q. I had expected you to say: "Yes, there was." Mr. Hoiles used to loan you a lot of books? You used to discuss many things together?

A. He even gave me a book, when I first began to talk with him.

Q. There was a time in 1940, in the heat of the campaign, when an instance arose that indicated the management was trying to be friendly toward you—— A. What campaign?

Q. The Roosevelt-Willkie campaign.

(Testimony of George William Duke.)

A. I don't know exactly what incident you are referring to, Mr. Sargent.

Q. Didn't there come a time in that campaign when the radio editor, Tom Dennison, had a syndicated column for some 22 papers, and didn't he put some Willkie stickers on his matter, and you wouldn't set it up in type? [300]

A. That is right.

Q. And you didn't set it up, and he was almost late for his 22 papers. Wasn't that so?

A. Yes.

Q. And the management, instead of taking it out against you, fixed the situation up and you came down there at night and set it? A. Yes.

Q. The management didn't criticize you or try to take advantage of the situation to embarrass you personally, did they?

A. In fact, I went to Mr. C. H. Hoiles and apologized personally for the whole thing.

Q. I am bringing out the matter of the good relationship between you and the paper. Isn't that so? A. I will say there was, personally.

Q. When you came to Mr. Hoiles on the night of April 30, 1941, wasn't your remark to Mr. Hoiles as follows: There is going to be a strike tomorrow morning, because the boys refuse to work any longer at the old scale? A. No.

Q. Didn't you say that, or that in substance to him? A. No.

Q. In your conversation with him didn't you mention dissatisfaction on the part of the boys with the scale? [301] A. You mean the scale?

(Testimony of George William Duke.)

Q. Scale, yes.

A. I did not mention scales specifically. I mentioned we could not come to an agreement.

Q. I see. Isn't it true that during negotiations in 1940 or 1941 that the management acceded to the union's desires and changed the starting time as the union wanted it done?

A. That may have been done officially, but the very last Friday I worked at the Register I started at 6:30 a. m., and all the force started at 6:30 a. m., those that worked on the day side.

Q. Mr. Ryan asked you the question with regard to: did you reach any agreement during the various meetings. You have had enough experience in negotiational meetings to know that it's the final time when the minds meet upon the important matters that everything comes into an agreement. Isn't that true? A. That is true.

Q. And the reason why no agreement was reached here was because you and the management could never get together on the few important things on which you had diametrically opposite positions?

A. No effort was made on the part of the employers to make a conciliatory move towards us in any respect whatsoever. I will make that statement. [302]

Q. You had a raise of $2.50 a week offered you?

A. That was not a raise in the hourly rate. We were going to be allowed to work two and one-half hours more.

(Testimony of George William Duke.)

Q. That was two and a half hours more time you were permitted to work?

A. The office had that right, any time during the verbal contract we have been talking about in this trial, as I stated a while ago, any time, upon two weeks notice during the duration of that contract, they could have notified us and established a 40 hour week, five days of eight hours each week.

Mr. Sargent: Mr. Examiner, I was wrong this morning when I said that I, by my questions, thought the overtime provision was over 40 hours a week. I was wrong. I understand the overtime was over 37-½ hours a week, not over 40.

Trial Examiner Moslow: Let us clarify it through this witness.

Q. (By Mr. Sargent): What was the provision about when overtime would begin in the verbal agreement in effect in 1937?

A. At the end of the regular day's work, seven and one-half hour shift.

Q. That is, overtime over seven and one-half hours per day, work over seven and one-half hours per day, was overtime, regardless of the number of hours per week? [303]

A. That is my understanding, that it was.

Q. Was there any difference with respect to whether——

Trial Examiner Moslow: Excuse me. You spoke of a clause which allowed the employer on two weeks notice to go on a 40 hour week. You mean

(Testimony of George William Duke.)

a 40 hour week without any penalty provisions for overtime?

The Witness: Yes. Then the 40 hours could be worked without overtime.

Trial Examiner Moslow: Then that would allow the employees to work eight hours a day without overtime?

The Witness: Yes.

Q. (By Mr. Sargent): A moment ago you made a statement that the management refused to make counter-proposals. Do you make that statement, taking into consideration the fact that the management has made, by your own testimony, seven counter-proposals, in 1940, and written and verbal counter-proposals in 1941?

A. Of course, I meant by my testimony that they have made no counter-proposals which would work toward a settlement of the differences between us.

Mr. Sargent: I object to the characterization "which would work toward a settlement of the differences between us." That wasn't put as originally stated and I ask that may go out, Mr. Examiner.

Trial Examiner Moslow: I will let it stand. He is now [304] qualifying his previous answers.

Q. (By Mr. Sargent): And the union, likewise, didn't make any counter-proposal with respect to apprentices, over time for straight matter men, and upon other matters other than wages, which, in the same sense, would look toward an agreement, did it?

(Testimony of George William Duke.)

A. We made several counter-proposals regardng wages.

Q. I am talkng about other than wages.

A. We made no counter-proposals regarding apprentices.

Q. You made no counter-proposals on anything except in regard to wages. Isn't that true?

A. That is correct.

Q. So far as the labor relations of this paper were concerned, for 23 years there had been a policy, had there not, of simply having a friendly understanding with respect to contracts, and no one of which had been committed to writing. Isn't that true? A. Repeat the question, please.

Mr. Sargent: Read the question.

(The question was read.)

The Witness: No.

Q. (By Mr. Sargent): Writing, and executed.

A. None had been signed to my knowledge.

Q. The same policy which was conducted by the Hoiles had been that which was conducted by Burke, and previously had [305] been conducted by Mr. Baumgartner. Is that correct?

A. The same policy in regard to a signed, written contract.

Q. Yes. And there was nothing different in 1940 or 1941 on this question than had existed in previous years, was there?

A. Except that our faith had been shaken due to the fact that we felt that there was antagonism

(Testimony of George William Duke.)

towards us as union men. We wanted a signed, written agreement which would be in good faith.

Mr. Sargent: I will ask that "we felt" go out.

Trial Examiner Moslow: I consider it irrelevant. I will let it stand, even though it may not be responsive.

Q. (By Mr. Sargent): The reason for your having felt as you do, which the Examiner has permitted to stand, was editorials which you read in the paper?

A. The editorials, and the fact that we could not reach an agreement between those owners and ourselves.

Q. As a matter of fact, Mr. Duke, what you wanted the owner to do was to agree to your proposals, and except for wages, you didn't propose to yield on any of them, so that there could be a basis for agreement; isn't that true, except upon your terms?

A. Upon the terms of the International Typographical Union laws, Mr. Sargent; we proposed to stand firm on those. In so doing we attempted to maintain a union within that chapel.

Q. And that meant that the management in all cases except [306] wages would have to come to your terms, if an agreement was reached?

A. It would have to meet the laws and regulations of the International Typographical Union, of which we are a member.

Q. Please, Mr. Duke, let us have an answer to my question. It is the same thing, but let us have a

(Testimony of George William Duke.)

clear cut answer. It meant, except for wages, because of your position, the management would have to come in all matters to your position to reach an agreement, except for wages. Isn't that true?

A. I will qualify my answer.

Mr. Ryan: I object to the question on the ground it assumes a fact not in evidence.

Trial Examiner Moslow: I will overrule your objection. You may answer.

The Witness: I will qualify that this way. Will you read that again, please?

(The record was read.)

The Witness: Our position is dictated by the International Typographical Union, and we would have no position as individuals, or as a group, except those conditions which would meet with compliance, with the laws of the International Typographical Union.

Mr. Sargent: Mr. Examiner, I submit to you I asked a question to which a yes or no answer is a very obvious thing, and I would like to have the witness answer it. [307]

The Witness: Mr. Examiner——

Trial Examiner Moslow: Just a moment. Read the previous question.

(The record was read.)

Q. (By Trial Examiner Moslow): Mr. Duke, you had no privilege of varying from international rules? A. That is correct.

Q. And the international rules covered everything but wages, or were other things left for negotiation?

(Testimony of George William Duke.)

A. Those were subject to negotiation.

Trial Examiner Moslow: Does that answer your question?

Mr. Sargent: No. I am asking a further question now.

Q. (By Mr. Sargent): Isn't it true, Mr. Duke, that regardless of the reason that the management would have had to agree with each one of the controversial subjects on your terms, except for wages, in order to reach an agreement with you?

A. I can't answer that yes or no.

Q. You certainly can. You have answered it a dozen times around the bush, but never directly.

Trial Examiner Moslow: What do you mean you can't answer yes or no? Let's have a full answer.

The Witness: Well, my position is this: Simply that the attorney is attempting to get me to make a statement as to a subject which was under negotiation at the time, and which [308] we could not reach an agreement upon, and if I make a direct yes or no answer now, it would, in my opinion, jeopardize the stand after that.

Mr. Sargent: All I want is the truth.

Q. (By Trial Examiner Moslow): Are hours covered by international law or are they subject to negotiation?

A. Hours up to 40 hours per week are subject to negotiation, and those had already been settled.

Q. Did the union make any other demands be-

(Testimony of George William Duke.)

sides wage increases of any kind, in the negotiations?

A. We asked for a signed, written agreement of the terms which would be reached.

Q. Is there anything in international law that requires an agreement to be written?

A. It is customary.

Q. Is there anything that requires it to be written? You had been existing for many years without having a written contract, had you not?

A. Yes.

Q. Is there anything that required it to be written, then? A. I think not.

Q. Were there any other demands of yours besides wages and the signed agreement?

A. That we come to an agreement and eliminate these other questionable practices which had been advanced by the employer, [309] which we were not able to do?

Trial Examiner Moslow: Continue.

Mr. Sargent: I ask to have the original question read again, please.

Trial Examiner Moslow: I think we have gone over this ground thoroughly. Any further questions are only a matter of argument or rhetoric. The facts are now in the record.

Mr. Sargent: I haven't got an answer now.

Trial Examiner Moslow: He has answered he was not free to negotiate on matters covered by international law.

Mr. Sargent: I asked whether or not the man-

(Testimony of George William Duke.)

agement wouldn't have had to agree upon everything except wages upon the union's terms, in order to reach an agreement.

Trial Examiner Moslow: He said they could arbitrate on hours and a signed contract.

Mr. Sargent: If he is testifying honestly why doesn't he answer "yes"? That is the truth.

Trial Examiner Moslow: I don't think your question can be answered "yes" in view of the testimony he has given.

Mr. Sargent: I am asking the truth. The truth is he has testified around the bush, but never directly, that unless the management met every single proposal of the union on the union's terms, except wages, there couldn't have been an agreement.

Trial Examiner Moslow: He just answered there could [310] be negotiation on hours over 40 hours a week. To that extent the employer had some leeway on the question. Continue.

Mr. Sargent: It was a question of this union, not the employer. I submit you want to get a record which is clear.

Trial Examiner Moslow: He has already given me three subjects on which there was some room for negotiations.

Mr. Sargent: Why doesn't he answer the question "no" if that is the case?

Trial Examiner Moslow: I don't know. Ask him.

Mr. Sargent: Do you understand the question, Mr. Duke?

(Testimony of George William Duke.)

The Witness: I am not sure I do, sir.

Mr. Sargent: I will go over it again.

Q. (By Mr. Sargent): If an agreement was to be reached in 1941 between the paper and the union, was it necessary for the paper to agree to each of the proposals of the union except the question of wages?

A. This is only a matter of opinion. We voted on the entire question, but I will say this: Had we been able to get a signed, written agreement from them, I believe we would have gone without an increase of wages, and still maintained the status with them.

Trial Examiner Moslow: That is not the question you were asked.

The Witness: Will you read the question?

Q. (By Mr. Sargent): All right, again. Except for the [311] exception wages for the paper and the union to reach an agreement, would it have been necessary for the paper to have agreed to each of the other matters in dispute with the union? That is exclusive of wages? A. Yes.

Mr. Sargent: That is all.

Trial Examiner Moslow: Any further questions?

Redirect Examination

Q. (By Mr. Ryan): Mr. Duke, the proposals as you have already outlined in your direct testimony included the discussion of vacations, did they not?

A. Yes.

Q. One of the requests of the union made to

(Testimony of George William Duke.)

representatives of the company in the meeting of April 15, 1940 was that if the terms were agreed upon between the union and the company representatives, that the union would desire they be reduced to a signed, written contract. Is that right?

A. Yes.

Q. At any time from then on throughout the negotiations which continued intermittently until the day the strike began, did the union ever retract that request upon the company? A. No.

Q. Was the union still maintaining its position for a signed, written contract at the time that the strike was voted on? A. Yes. [312]

Q. Are you still maintaining that as one of your positions? A. Yes, we are.

Q. You were asked on cross examination in respect to the supervision of apprentices' training in the composing room of the Register, as to what the method of supervision was, and whether or not there was any provision in your by-laws as to how these apprentices should be supervised in their training, section 18 in the 1941 by-laws.

Trial Examiner Moslow: Referring to General Laws, Article 1, Section 18, at page 95 of Board's Exhibit 4?

Mr. Ryan: Yes.

Trial Examiner Moslow: What is your question?

Q. (By Mr. Ryan): My question is whether or not there is anything in the by-laws which regulates the supervision of the training of apprentices?

A. Yes, there is.

(Testimony of George William Duke.)

Q. Will you look at Board's Exhibit 4 and tell us what section of the by-laws covers that point?

A. Section 18.

Q. And what page, under what——

A. Page 95.

Mr. Sargent: 1940?

The Witness: 1940.

Mr. Ryan: Yes. May we go off the record?

Trial Examiner Moslow: Off the record. [313]

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Mr. Ryan: Will you stipulate that the provision, Section 18, page 95 of the 1940 by-laws of the International Typographical Union is identical with the provision as it now exists in 1942?

Mr. Sargent: Oh, yes.

Mr. Ryan: It still continues as the same provision.

Trial Examiner Moslow: Is it agreed it was the same in 1941, also?

Mr. Sargent: I assume so. I would be willing to stipulate that.

Trial Examiner Moslow: Do you stipulate that, Mr. Ryan?

Mr. Ryan: It is the same.

Trial Examiner Moslow: Very well. Anything further?

Mr. Sargent: I would like to have counsel develop that section a little bit more than he has.

Mr. Ryan: Will counsel for the respondent stip-

(Testimony of George William Duke.)

ulate that the persons named in paragraph 13 of the complaint were employees in the composing room of the Register as of April 30, 1941, immediately preceding the strike?

Mr. Sargent: Wait until I ask, to make sure whether there are any exceptions or not.

Mr. Ryan: Mr. Lawrence, the foreman, is in the back of the room and he tells me some of the people [314] on the list were substitutes and not regularly employed journeymen.

Mr. Ryan: But they were part time employees, isn't that right?

Mr. Sargent: Of course, a sub isn't a part time employee. I have no desire to hamper you, but if a sub comes on for a day, as you know, his card is taken out, he becomes a regular employee for that day, but he might not be a regular employee for the next day. The regulation of the union was you couldn't have part time employees here.

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Mr. Ryan: I have no further questions of Mr. Duke.

Trial Examiner Moslow: Anything further?

Mr. Sargent: May I ask Mr. Ryan to what he referred by section 18 of article 1 of General Laws? You didn't finish up on that, and I don't know what you had in mind there.

Mr. Ryan: As I understand your question on

(Testimony of George William Duke.)

cross examination, you were inquiring of the witness as to how these apprentices would be transferred from job to job, whose duty it was to see they learned these various jobs, and whether or not there was any by-law of the union which would tend to regulate that matter. [315]

Recross Examination

Q. (By Mr. Sargent): Section 18 is very short, Mr. Examiner, and reads as follows: "The foreman and chairman of the chapel shall see that apprentices are afforded every opportunity to learn the different trade practices by requiring them to work in all departments of the composing room. When apprentices show proficiency in one branch they must be advanced to other classes of work."

Would you say that the linotype was one department of the composing room, Mr. Duke?

A. Yes, sir.

Q. And the essence of this section is that both the foreman and the chairman of the chapel are each charged with the responsibility of seeing that the apprentice has every opportunity to learn the various processes. Is that right? A. Yes, sir.

A. And this section doesn't say whether the foreman or the chairman of the chapel shall direct minutely the work of the apprentices in the composing room. Is that right?

Trial Examiner Moslow: It speaks for itself, Mr. Sargent.

Q. (By Mr. Sargent): What happens, Mr.

(Testimony of George William Duke.)

Duke, when there are a lot of varying and conflicting interpretations of the I.T.U. laws, if you know?

A. You mean in what situation?

Q. Suppose that when the local comes to draw a contract with [316] the publisher, as for example in Santa Ana, the publisher takes the position that the I.T.U. laws in question mean one thing and the local says it means another. How is that question of interpretation solved?

A. To the members of the union it is solved by the answer of the president of the International Typographical Union or some executive officer, or the executive council, to their question as to the interpretation of the law.

Q. And do you know the procedure which is available to an employer if he decides to appeal from the decision of the president of the International Typographical Union?

Trial Examiner Moslow: You say an employer may appeal?

The Witness: I do not know that.

Mr. Sargent: All right. That is all.

Trial Examiner Moslow: Just one second. I previously reserved a ruling on Board's Exhibit 3. I will now receive it in evidence.

Mr. Sargent: What was 3?

Trial Examiner Moslow: The by-laws in effect January 1, 1942.

(Thereupon the document heretofore marked as Board's Exhibit 3, for identification, was received in evidence.)

(Testimony of George William Duke.)

Trial Examiner Moslow: Furthermore, in view of the importance these by-laws seem to take, I will reverse my ruling and receive in evidence Board's Exhibit 6, the by-laws [317] in effect January 1, 1941. So, we will now have a complete set in evidence.

I think, technically, you withdraw Board's Exhibit 6. Do you wish it marked as a Trial Examiner's Exhibit or as a Board's Exhibit?

Mr. Ryan: Let it remain as Board's Exhibit 6, and I will offer it in evidence.

Trial Examiner Moslow: Very well.

(Thereupon the document referred to was marked as Board's Exhibit No. 6, and was received in evidence.)

Trial Examiner Moslow: Mr. Duke, are these prior contracts with Baumgartner and the predecessor of the Hoiles, were they also oral?

The Witness: Yes, sir.

Q. (By Trial Examiner Moslow): Did the contracts with the commercial job printers executed in 1941, provide for apprentices, for control of apprentices? A. Yes, sir.

Q. When did the competitor of the Register, the Journal, go out of existence?

A. Either 1938 or 1939.

Q. Does the Register publish a daily edition, or more than one daily?

A. At the time I worked there, there was a home edition and an edition which was delivered

(Testimony of George William Duke.)

before that, for the street, [318] two editions, in the afternoon.

Q. You testified that Mr. Hoiles made some proposals in 1940. Were these proposals in writing or oral. You mentioned several proposals.

A. They were on a slip of paper.

Q. Did he give them to you on a slip of paper?

A. Yes.

Q. Is that paper still in existence?

A. I don't think so.

Q. How did these proposals happen to be in existence in 1941 when you resumed negotiations?

A. I think they were brought up as something that was left over from 1940 that we had not reached an agreement on, brought up by us, by the union representatives.

Q. They were a subject of discussion in 1941 then? A. Yes, sir.

Q. Tell me why, in your opinion—strike that.

Tell me why the control of apprentices was important to your local, if it was important.

A. It was important because an apprentice, if the number is not regulated, will eliminate or displace a journeyman, who already has employment, and the purpose of the union is to protect its members in the work they already have, try to maintain that as long as they can.

Q. How will an apprentice displace a journeyman? [319]

A. Sometimes, after an apprentice has two or three years experience, he is proficient enough in

(Testimony of George William Duke.)

one branch to replace a journeyman in that branch, such as make-up, or the composition of ads.

Q. When an apprentice replaces a journeyman, does not the apprentice get the same wage as the journeyman?

A. No. He works for apprentices' wages.

Q. You mean the apprentice, during the period of apprenticeship, may be doing the same type of work as some journeyman? A. Yes.

Q. At a reduced wage?

A. At a reduced wage.

Trial Examiner Moslow: Anything further?

Mr. Ryan: No.

(Witness excused.)

Mr. Ryan: Call Mr. William Bray, please.

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WILLIAM BRAY,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ryan:

Q. Will you state your full name, please?

A. William Bray.

Q. Where do you live?

A. I live at San Diego. [320]

Q. Were you ever employed by the Register Publishing Company? A. Yes, sir.

(Testimony of William Bray.)

Q. When? For what period?

A. I think from about June 1, 1937 until April 30, 1941.

Q. In what capacity were you employed?

A. I was a printer.

Q. Did you work in the composing room of the Register? A. Yes, sir.

Q. Are you a member of the International Typographical Union? A. Yes, sir.

Q. How long have you been a member?

A. My card lapsed one time. I first joined in 1911, but for two or three years, my card lapsed, for non-payment of dues.

Q. But you are now a member?

A. Yes, sir.

Q. How long have you been a member?

A. Since I came here in, I think it was the first of June, I am not sure about it, 1937. That is, about the first of June.

Q. Are you classed as a journeyman?

A. Journeyman-printer. That is, a man in that kind of printing. [321]

Q. Are you a combination man?

A. Yes, sir. That's the way I worked here.

Q. On the evening of April 30, 1941, did you have a conversation with Mr. C. H. Hoiles of the Register Publishing Company?

A. C. H. is this gentleman here (indicating)?

Q. The young Mr. Hoiles.

A. Yes, sir.

(Testimony of William Bray.)

Q. Where was that conversation and what was said? A. It was in his office.

Trial Examiner Moslow: Is this before or after the union meeting?

The Witness: It was after the strike vote had been taken.

Mr. Sargent: It was after?

The Witness: Yes, sir.

Q. (By Mr. Ryan): How did you happen to be in Mr. Hoiles' office?

A. Well, somebody, I think it was Mr. Juillard, while I was at work, came and told me that Bill, that is, Mr. Lawrence, wanted to see me in his office.

Q. Mr. Lawrence is whom?

A. Foreman. I went up to his office and looked in, and he wasn't in there, so I asked Mr. McKee if he knew where he was at, and he says, "In the front office." [322]

And I followed him and I met somebody else there, and they said they were in Clarence Hoiles' office.

Q. You went into Clarence's office?

A. Yes.

Q. Do you mean Clarence Hoiles? In his office?

A. Yes, sir.

Q. Was anybody else present?

A. Well, Mr. Lawrence was there, I think, right at the time, but I think he went out, and the other Mr. Hoiles came in, and Mr. Juillard came in, and he went out while we were doing the talking.

(Testimony of William Bray.)

Q. What did Mr. Hoiles say to you?

A. He said he had a proposition to make me. He wanted me to go to work the next morning.

Q. Go ahead. Tell us what was said and who said it.

A. I will tell it as near as I can remember it. That's been some time ago. And I asked him what kind of a proposition. I told him I was always open to a proposition; and he told me he would give me the same wage I was getting, plus $1.50 an hour overtime, and all the overtime I wanted, for a time, at least, if I would come back to work in the morning.

I asked him if he knew what would happen to me in case I done that, and he says, "Nothing."

And I said, "Yes, there would. I would be expelled and fined at least a thousand dollars for that." [323]

Q. Expelled from what?

A. From the union.

Q. Did you tell him you would be expelled from the union?

A. Yes, there would be no question about it. And as near as I can remember why, he says, "We will take care of any damages that it causes," and several times he mentioned "We have plenty of money. We will take care of any damages caused by it."

I believe about that time the other Mr. Hoiles came in and he started one of his stories, about he furnished the tools, well, one of them kind of

(Testimony of William Bray.)

stories, you know; if I would do the work he would furnish the tools. And I commenced to get kind of fidgety, so I told him I would have to go home and talk it over with my wife, and I would let him know the next morning.

Q. Is that all the conversation that was had at that time between you and Mr. Hoiles?

A. That is all I can remember of. I went out, then, in the composing room, and while I was in there, these other fellows had left, and I found out I was by myself and I got out.

Q. What other fellows have you reference to?

A. The boys working there in the composing room when I left. They were at work and while I was in the front they disappeared.

Q. While you were in Mr. Hoiles' office having this [324] conversation? A. Yes.

Q. Did you go home after leaving Mr. Hoiles' office?

A. No, I didn't go home until about morning. In fact, it was morning.

Q. Then, did you have any conversation with Mr. C. H. Hoiles or his father, Mr. R. C. Hoiles?

A. Yes. He came to my house.

Trial Examiner Moslow: When did he go to your house?

The Witness: The next morning. But I didn't talk to him that morning. He came to my house the Sunday after the strike, about noon.

Q. (By Mr. Ryan): The Sunday after the strike first began?

(Testimony of William Bray.)

Trial Examiner Moslow: Can we fix what day of the week the strike began? Does anyone have a calendar here?

The Witness: I think Thursday.

Mr. Sargent: Thursday, I believe was the strike.

The Witness: I believe they struck on Wednesday, about 10:00 o'clock, when they went out.

Trial Examiner Moslow: May 1st was Thursday. This would be May 4th?

The Witness: It was the next Sunday.

Trial Examiner Moslow: Go ahead.

Q. (By Mr. Ryan): On Sunday did Mr. R. C. Hoiles come to your home to see you? [325]

A. Yes, sir.

Q. Did you have a conversation?

A. Yes. He came in. I asked him in, he came in and sat down, and said he hadn't been sleeping very well, and had been doing a lot of thinking. He had a scheme, and he wanted to know what I thought of it.

Q. Did he tell you he had this scheme?

A. Yes, sir, and he told it to me. He figured out a scheme whereby he could have a company union, a private union of his own.

Mr. Sargent: I object to the designation and ask you to say what Mr. Hoiles said to you.

Trial Examiner Moslow: Just tell us what he said. Don't give any characterization. Give us the substance of what he said.

The Witness: I think that is what he said.

Trial Examiner Moslow: What did he say?

(Testimony of William Bray.)

The Witness: He said he had figured out a plan whereby—that he thought it would be better than the Typographical Union. That is the way he put it. And I asked him what it was, and he said if I would come back to work for him at $40 a week—he weakened on the wages—and at any time that I wanted to, I could take two weeks off and go hunt a better job, and in case I couldn't find it in two weeks, then I could come back and go back where I was. [326]

Q. (By Mr. Ryan): You could go back working for him? A. Yes.

Q. Did he say that?

Trial Examiner Moslow: What was said about some plan for a company union?

The Witness: I would not just say—he didn't call it a company union. It was a plan he had of his own.

Trial Examiner Moslow: What was the plan?

The Witness: That I was to go back to work at $40 a week and any time that I wanted to I could take two weeks and go hunt a better job. If I didn't find it I could come back and go back for him.

Trial Examiner Moslow: Is that what you call a company union?

The Witness: That would be his—I asked him who would be going to—he also told me as I would get older I wouldn't be able to earn as much, and he said he would have to decrease my wages.

And I says, "Who is to be the judge of that?"

And he says, "I am."

(Testimony of William Bray.)

So, if that isn't a company union, I don't know what is one. That was the substance of that.

Q. (By Mr. Ryan): Is that all that was said?

A. No, he said lots more. He claimed he had trouble with the Typographical Union before, and they had cost him a [327] fortune, I think he said $80,000, or something like that; and he would never have nothing to do with them. That's the way he put it.

Q. Did he tell you where he had trouble with the Typographical Union before?

A. I think he said back east.

Q. Do you know whether or not he has a newspaper back east?

A. I just know by hearsay.

Mr. Ryan: I have no further questions. You may cross examine.

Cross Examination

By Mr. Ryan:

Q. What did you say Mr. R. C. Hoiles was to be the judge of, Mr. Bray?

A. He was to be the judge when I got older and could not earn as much money as I was earning now, he was to be the judge of how much I was to be paid.

Q. That is, when you got older? A. Yes.

Q. Superannuated? A. Yes, sir.

Q. But if, at that time, when you got old, and could not do very much, you could get a better job from somebody else, if you could get it?

(Testimony of William Bray.)

A. I could do that any time. He said I could do that any time. [328]

Q. You had complete leeway, by giving him notice, to go any time you wanted to, for a better job?

A. Yes. He gave me that permission.

Q. As a matter of fact, Mr. Bray, you were the only person in that shop at that time, who was a combination man, weren't you?

A. No, I wasn't. I was the only one that worked at it, but several others could have worked at it, if they had been called on. But I think during that time I was there, so far as I know I was the only one that worked combination.

Q. Others didn't work as combination men, but could have?

A. That is the way I understand it. I never seen none of their work as combination men, and I couldn't say for that, but that is my understanding.

Q. Why is it that the average printer, who has been through all the experience that he gets as an apprentice, isn't qualified to be a combination man?

A. In my opinion, that's the printing trade.

Q. What do you mean, that's the printing trade?

A. Well, I worked, probably, I should say, around at 100 to 150 different shops, at different times, big and little ones, good ones and bad ones, and I tried to learn the business.

Q. You don't think that a lot of the other

(Testimony of William Bray.)

people who go through the same apprenticeship, try to learn the business [329] the way you did?

Mr. Ryan: I object to that as immaterial, and irrelevant.

Trial Examiner Moslow: Objection sustained.

Q. (By Mr. Sargent): At the time you worked for the Register, did you work days or nights?

A. Nights, mostly.

Q. Were you a regular journeyman, or were you a sub? A. I was a sub.

Q. What was this remark you say Mr. Hoiles made to you, that he would furnish the tools and you would furnish the work?

A. Well, I couldn't say what it was. I didn't pay any attention to it. It's the same stuff that he always talked.

Q. When you got back to the composing room, the rest of the composing room boys had gone. Is that it? A. Yes, sir.

Q. And then you left?

A. I certainly did; in a hurry.

Q. Did you have a meeting after that?

A. Not a union meeting.

Q. What do you mean? You said you didn't go home until morning. Was there a celebration?

Mr. Ryan: I object to that as immaterial and irrelevant.

Trial Examiner Moslow: Objection sustained.

Mr. Sargent: I was only touchng upon what you touched [330] upon, when Mr. Ryan asked him

(Testimony of William Bray.)

on direct, here. I ask this question in all seriousness.

Q. (By Mr. Sargent): Was there a lot of jubilance on the part of the employees who were out? A. No. No.

Mr. Ryan: I object to that as immaterial and irrelevant; and it has no bearing on the issues in this case.

Trial Examiner Moslow: I think it is irrelevant; but I will let the answer stand.

Mr. Sargent: I think your Honor is going to think I am going into something facetious when I ask this question, but I don't mean it as such.

Q. (By Mr. Sargent): After you left work on the night of Wednesday, April 30th, about 11:00 o'clock, had you come to any conclusion at that time in your own mind as to whether you were going to go back to work or not?

Mr. Ryan: I object to that as immaterial.

Trial Examiner Moslow: What is the relevancy of this?

Mr. Sargent: Well, that is why I thought you might think my question facetious, because I wanted to get back to what happened that night.

Trial Examiner Moslow: Upon your statement there is something there not apparent on the surface, I will overrule the objection.

Q. (By Mr. Sargent): Had you made up your mind as to whether [331] you were going to go back to work?

A. There never was any question. I never had

(Testimony of William Bray.)

any question, any idea of going back to work as long as the place was struck.

Q. Did some of the printers who were working in the composing room of the respondent, that is the company, go with you that night when you went out?

Mr. Ryan: I object to that as immaterial.

Trial Examiner Moslow: Overruled. You may answer.

Q. (By Mr. Sargent): Did they?

A. Yes. Mr. Hawks and Mr. Sherwood went with me.

Q. And they were with you throughout the evening. Is that right?

A. Well, they were a part of the evening, yes.

Q. They were two of the printers who had gone out on strike too? A. Yes, sir.

Mr. Sargent: That is all.

(Witness excused.)

Mr. Ryan: Mrs. Bray to the witness stand, please.

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NORMA BELL BRAY,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ryan:

Q. Are you the wife of the man who just [332] testified? A. I am.

(Testimony of Norma Bell Bray.)

Q. And where do you live, Mrs. Bray?

A. Out at 2129 "B" Street, in San Diego, now.

Q. You were the wife of Mr. Bray during his term of employment with the Santa Ana Register. Is that right? A. Yes.

Q. On the morning of May 1, 1941, on or about that date, between 6:00 and 7:00 a.m. in the morning, do you recall having a conversation with Mr. R. C. Hoiles of the Register Publishing Company, at your home? A. Yes, sir.

Q. Will you tell us about that conversation?

A. Well, he came in, that is the elder Mr. Hoiles, he came to the house. I had never met him before. He introduced himself and stated he was Mr. R. C. Hoiles. He said he wanted to talk to me about the situation at the Register, and he didn't think I understood it.

I told him I understood it too well. He wanted, he said he understood I objected to Mr. Bray going back to work under the strike conditions, and I said I most certainly did object to it.

And, oh, he said that if I would use my influence to get Mr. Bray to go back to work, he would put a thousand dollars in escrow in the bank to be used for anything that came up, [333] that we would need it for. And he also said he would furnish all the money that I needed for our present uses.

Mr. Sargent: Just a second there, please.

Q. (By Mr. Ryan): Providing what?

A. Providing Mr. Bray went back to work and broke the strike.

(Testimony of Norma Bell Bray.)

Q. Did he say anything further, Mrs. Bray?

A. Well, I told him that I didn't want Mr. Bray to become what was known as a "rat" and he wanted to know if I feared violence, that the other men would beat up on him, I guess that's what it means. And I told him no, I never thought anything about that.

Q. Did Mr. Hoiles say anything to you about why he would not agree to meet the demands of the union?

A. Well, he went into quite a lengthy detail. I am not so well acquainted with it. But mostly because he just didn't believe in unions. That was my idea of it.

Q. Did he say that?

A. Yes, he said that.

Mr. Sargent: I was going to object to the characterization, but if I may interject one word, Mr. Examiner: He told you he didn't believe in unions?

The Witness: Yes, he did.

Q. (By Mr. Ryan): Did he say anything about having self-respect?

A. Well, yes. He said he couldn't take the union back, as [334] it was on account of his self-respect; and I told him we had self-respect too.

Mr. Ryan: I have no further questions. You may cross examine.

Trial Examiner Moslow: Did you ever tell this conversation to your husband?

The Witness: Well, it so happens that my husband heard the whole thing. I didn't think Mr.

(Testimony of Norma Bell Bray.)

Bray was there, but he had come in the back door, and was in the back room and heard everything Mr. Hoiles said.

Trial Examiner Moslow: Go ahead.

Cross Examination

By Mr. Sargent:

Q. Did Mr. Hoiles know that Mr. Bray, your husband, was in the back room when he was having the conversation with you?

A. No, I don't suppose he did, because I didn't know it myself. It was quite early in the morning and I had the children in the front room sleeping, and I didn't ask him in.

Q. Mrs. Bray, this conversation with Mr. Hoiles, tell us once more about this thousand dollar proposition.

A. Well, that was when he was talking about—I told him if Mr. Bray went back and broke the strike he would be fined a thousand dollars, and he said he would put a thousand dollars in escrow to be used for that, in case that happened, or in case—— [335]

Q. Oh, I see. The $1,000 was in case Mr. Bray was fined? A. Not exactly.

Q. You tell us what happened.

A. That is what I told you.

Q. In other words, the $1,000 discussed was in the event Mr. Bray should be fined $1,000 by the union. Is that right? A. Well, yes.

Q. For going back to work. Is that right?

(Testimony of Norma Bell Bray.)

A. Yes.

Q. He wasn't offering you $1,000, or Mr. Bray $1,000 for coming back to work, was he?

A. Well, yes.

Trial Examiner Moslow: Do you know what the word "escrow" means, Mrs. Bray?

The Witness: That is to be put into the bank—I think I do.

Trial Examiner Moslow: What do you think it means?

The Witness: He would put that sum of money in the bank, and, of course, I couldn't draw it or he couldn't either, unless something like this came up.

Trial Examiner Moslow: Something like what came up?

The Witness: Like if Mr. Bray would go back and the union was fining him $1,000, this would take care of it.

Q. (By Mr. Sargent): In other words, it was provided against a contingency whereby Mr. Bray might have to pay this to [336] the union in order to get back in. Is that right?

A. No, not exactly. He said that too, but he said $1,000, or any amount of money that we needed right at this time would be provided.

Q. In other words, whatever Mr. Bray might himself have to pay to the union if he should be fined, or suspended, then that——

A. Nothing was said in that direct way, no.

Q. Have you anything to add to what you have

(Testimony of Norma Bell Bray.)

already said as to what the $1,000 was to be used for, or have you told us the whole story?

A. Well, that's all that I—he said said for any other purpose, so I think that covers everything.

Q. It was to be indemnity—do you know what indemnity means? A. You explain it.

Trial Examiner Moslow: Did you understand you could draw on this $1,000 for your personal uses?

The Witness: No. I know I could not draw on it. But also, Mr. Hoiles said he would furnish all the money I needed for immediate use, if I needed any money he would see it was furnished.

Trial Examiner Moslow That was apart from the $1,000?

Q. (By Mr. Sargent): You mean for living expenses or what?

A. I presume so, yes. [337]

Q. Or as an advance of wages?

A. There was nothing said about an advance of wages, no.

Q. I see. You said you had no fear of any violence? A. No.

Q. And you were the person who used the expression that there might be some penalty against Bill if he "broke the strike". Is that right?

A. Well, not in violence. I didn't mean that.

Q. But apart from violence, you were the person that said something might be necessary in case Bill broke the strike. That was your expression, "broke the strike," wasn't it?

(Testimony of Norma Bell Bray.)

A. I don't quite understand you.

Q. Weren't you the person who raised the question about Bill's breaking the strike, as you referred to it in your direct testimony? Do I make myself clear or don't I?

Trial Examiner Moslow: Mrs. Bray, how did this question of the $1,000 get brought into the discussion? Who opened up the matter?

The Witness: When he was asking me about permitting—I guess you would call it that—Mr. Bray to go back to work as a strikebreaker, I told him I thought the fine on that would be $1,000 if he did such a thing, which I wouldn't think of telling him to do any such thing as that.

Trial Examiner Moslow: Mrs. Bray, did you use the term "strikebreaker" or did Mr. Hoiles use the term "strikebreaker"? [338] Is that your question, Mr. Sargent? Is that the actual word he used, or are you using it now?

The Witness: It is a word I am using now.

Mr. Sargent: That is all.

Trial Examiner Moslow: Do you have anything further?

Mr. Ryan: Nothing further.

(Witness excused.)

Mr. Ryan: I would like to recall Mr. Bray for one question I omitted to ask.

WILLIAM BRAY,

recalled as a witness by and on behalf of the National Labor Relations Board, having been previously duly sworn, was examined and testified further as follows:

Trial Examiner Moslow: You understand you are still under oath, Mr. Bray?

The Witness: Yes, sir.

Direct Examination

By Mr. Ryan:

Q. Mr. Bray, in this conversation that you had with Mr. C. H. Hoiles on the night of April 30th, that you have testified about, did he say anything to you about a written contract with the union?

A. About a written contract with the union?

Q. Yes. About whether or not——

Mr. Sargent: That is a very leading question. I don't think counsel should have asked it in that way. And I ask [339] that he let the witness do the testifying.

Trial Examiner Moslow: I will overrule the objection.

The Witness: No, I don't remember him saying anything about a contract with the union.

Q. (By Mr. Ryan) To refresh your recollection, did he make the statement to you——

Mr. Sargent: Just a minute. You haven't exhausted his recollection yet. No foundation has been laid for this yet.

Trial Examiner Moslow: I will overrule the objection.

(Testimony of William Bray.)

Q. (By Mr. Ryan) To refresh your recollection, did he say to you that he would never sign a contract with the union? A. Yes, sir.

Q. Now, tell us what he said.

A. I'll tell you. I told him that in case I would go back to work, and maybe in two or three days he would sign with the union—he is a man that changes his mind—he says, "We will not sign up in two or three days and we will never sign with the union."

That's the very words he said.

Mr. Ryan: That is all.

Mr. Sargent: Mr. Examiner, the reason why I objected so strongly to this answer is because, if a matter of this importance had been in the witness' mind, he wouldn't have had any need to refresh his recollection at all, to call it to his attention. When I objected to counsel's question, [340] and you overruled my objection, you, without any foundation being laid so as to exhaust his recollection, as to the rest of the conversation—up pops this one question, and then we get an answer here which I submit to you has all the earmarks of being suggested,—and I am not, of course, saying any reflection upon you, Mr. Ryan—to the witness.

And I submit to you that it is an illustration of where a question is put improperly to a witness the result is something which I don't think should be in the record.

Trial Examiner Moslow: I don't agree with you at all. I don't think the question is leading, and I

(Testimony of William Bray.)

don't think the answer was suggested by the question. He has a right to refresh a witness' recollection.

Mr. Sargent: He didn't ask for any other details of the conversation.

Trial Examiner Moslow: If this witness had merely answered yes or no, there might have been some force to your contention. But his answer could not have been suggested by the words of Mr. Ryan. He gave an entire conversation.

You are at liberty to cross examine.

Cross Examination

By Mr. Sargent:

Q. You were afraid, were you, Mr. Bray, that if you went back to work for Mr. Hoiles and then the company signed up with the union, that you might find the union objecting to you as an employee in the composing room [341] of the Register. Is that right? A. No, I wasn't afraid of it.

Q. Well, you expressed some fear to Mr. Hoiles, didn't you, that if you came back the union might take some action against you?

A. They certainly would have taken action against me. There is no doubt about that. That would be automatic, the very minute I started to work there.

Q. You had no idea of returning to work under any circumstance, did you?

A. Not as long as the place was struck, no.

Q. Then there wasn't any real occasion to be

(Testimony of William Bray.)

afraid of what might happen if you came back to work, was there?

Mr. Ryan: I object to that question.

Trial Examiner Moslow: Objection overruled.

The Witness: What was the question?

Q. (By Mr. Sargent) There was no real reason for you to be afraid of any contingency, or what might happen if you did go back to work?

A. No, no reason I know of. I never even thought of going back to work.

Q. How did the question arise between you and Mr. Hoiles? How did he come to say he wouldn't sign up with the union in two or three days?

A. Well, when he was making the proposition I told him he [342] might change his mind in two or three days, and sign up with the union, and he says, "No, I won't sign up with the union in two or three days and I will never sign with the union." He just kind of laughed.

Q. In other words, he gave you to understand he wouldn't agree to the union's propositions that he hadn't agreed to in negotiation?

A. That's what he said. I don't know what he meant. He told me he wouldn't sign up with them in two or three days, he would never sign up with them, and that's when he made the suggestion that he had plenty of money, and would take care of any damage for me, if I was afraid of that.

Q. When you say "damages", what did you understand he meant? If you were fined by the Typographical Union?

(Testimony of William Bray.)

A. That's what he meant.

Q. That's what he meant? A. Yes, sir.

Q. That is what you understood him to mean at the time?

A. Yes, sir. I didn't say nothing about it.

Q. How did you come to ask him whether he might change his mind and sign up with the union in two or three days?

Mr. Ryan: Objection.

Trial Examiner Moslow: Objection overruled.

The Witness: Because I kind of expected to see that happen. I have seen strikes before, lots of them. [343]

Q. (By Mr. Sargent) And oftentimes after a strike, the employer gets together with the union?

A. Yes, sir.

Q. And you thought that might occur here?

A. Yes, sir.

Q. And if you had gone back to work for him you might find yourself between the devil and the deep sea? A. That's right.

Q. And you wanted to protect yourself against that?

A. Well, there was a principle involved there too. I have a little principle.

Q. But you wanted to protect yourself, too?

A. Well, naturally.

Q. Were you aware negotiations were going on between Mr. Hoiles and the union?

A. Oh, yes.

Q. You had been at various union meetings?

(Testimony of William Bray.)

A. Some of them. I didn't go to all of them.

Q. You weren't there the night the strike was voted? You were working?

A. No, sir. I was there.

Q. Oh, you were there? A. Yes, sir.

Q. What did you do? Leave your work and go to the meeting and then come back? [344]

A. I don't start to work—I think it was 8:00 o'clock on that night, and I had an understanding with the boys that started at 7:00 o'clock to work an hour or two, and they came down and I and Mr. Sherwood, that went on late, we had made arrangements not to go to work until after the union meeting.

Q. And you were there when the discussion happened in regard to the things upon which you and the management couldn't agree?

A. I was to some meetings.

Q. I am talking about this one night, April 30th.

A. The night of the strike vote? Yes, sir. Yes, sir, I was there.

Q. You understood there were certain things where the management and the union took diametrically opposite positions? A. Yes, sir.

Q. And each felt it was right?

A. Well, the union thought they was right. I don't know what Mr. Hoiles thought.

Q. You thought there were pretty wide differences of opinion, didn't you?

A. There seemed to be.

Q. And you didn't think the union was going to yield, did you?

(Testimony of William Bray.)

A. I didn't know. You can't always tell by a strike vote what would happen.

Q. You didn't think the management was going to yield, did [345] you?

A. I didn't know that either.

Mr. Ryan: Mr. Examiner, I can't see any point in this.

Mr. Sargent: Just a minute. I am pretty near through.

Q. (By Mr. Sargent) Then, when you talked with Mr. Hoiles later that evening, you got the impression from Mr. Hoiles that his position after the strike was called was the same as his position before the strike was called? That he couldn't agree to union demands? Is that right?

Mr. Ryan: I object to that as immaterial.

Trial Examiner Moslow: Objection overruled.

The Witness: I don't understand your question, but I had my opinion on it.

Q. (By Mr. Sargent) Let me give it to you again. You knew what the position of Mr. Hoiles was, because Mr. Duke came to the meeting and told you what the management's position was?

A. Yes.

Q. Then, you went back and started to go to work, and you went to see Mr. Lawrence, and he was in Mr. Hoiles' office? A. Yes, sir.

Q. And then you got talking to Mr. C. H. Hoiles? A. Yes, sir.

Q. And he told you the position of the paper was just the same after the strike was called, and

(Testimony of William Bray.)

they wouldn't sign up [346] on terms that hadn't been agreed to before the strike?

A. I think that is right, as near as I can remember.

Mr. Sargent: That is all.

Mr. Ryan: Just a minute.

Redirect Examination

By Mr. Ryan:

Q. Repeat again just what Mr. Hoiles said with respect to whether or not he would sign up an agreement. Just repeat it as you remember his saying it.

Mr. Sargent: If it is pure repetition, I object to it.

Trial Examiner Moslow: Objection overruled.

The Witness: Well, that's when I asked him that maybe in two or three days he would be signed up with the union, he would have changed his mind; I have known him to do that. He said, "We won't change our mind in two or three days, and will never change our mind. We will never sign up with the union." That is what he said.

Mr. Ryan: That is all.

Recross Examination

By Mr. Sargent:

Q. Did you reach the conclusion in your mind that when he said that, that the management and the union were as far apart in their ideas as they had ever been? A. I had my opinion on it.

(Testimony of William Bray.)

Mr. Ryan: I object to the question: It is immaterial what the individual people——

Trial Examiner Moslow: Objection overruled.

[347]

Q. (By Mr. Sargent) Is that your conclusion?

A. I can give you my opinion of the whole deal, what I had in my mind at the time.

Q. May I have an answer to that question?

A. That would be the answer. I think Mr. Hoiles wanted them to strike.

Q. You think he did?

A. I think he wanted them to.

Q. And that the management and the union were as far apart after the strike as they were before the strike?

A. They naturally would be farther, I would think.

Mr. Sargent: All right.

Trial Examiner Moslow: You are excused.

(Witness excused.)

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CLARENCE C. LILES,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ryan:

Q. What is your address, Mr. Liles?

A. 1424 East Wilson Avenue, Glendale.

(Testimony of Clarence C. Liles.)

Q. What is your occupation?

A. Stereotyper. At the present time I am business agent for Allied Printing Trades.

Q. Where is the office of that union? [348]

A. 411 South Main Street, Los Angeles.

Q. Is that your headquarters? A. Right.

Q. On May 2, 1942, or about that date——

Trial Examiner Moslow: 1942?

Mr. Ryan: 1941. I am sorry.

Q. (By Mr. Ryan) May 2, 1941, do you recall having a conversation with Mr. C. H. Hoiles?

A. I believe it was on May 5th that I talked to him.

Q. About that time anyway? A. Yes.

Q. Where did that conversation take place, Mr. Liles? A. In Mr. Hoiles' office.

Q. Was it the younger Mr. Hoiles?

A. Yes, sir. (Indicating).

Q. Will you tell us what that conversation was about? Strike that, please. Was anyone present other than you and Mr. C. H. Hoiles during the conversation?

A. The secretary of the Stereotypers Union, Mr. Ed Saleh.

Trial Examiner Moslow: As I understand it, you are not an employee of this company?

The Witness: No.

Q. (By Mr. Ryan) This Mr. Saleh you have mentioned, was he an employee of the company at that time?

A. He was a part time employee, yes. [349]

(Testimony of Clarence C. Liles.)

Q. A stereotyper? A. Yes.

Q. Will you tell us what Mr. Hoiles said during the conversation, if anything?

A. Well, my business with Mr. Hoiles was that when I came down to see him my union had taken the stand they wouldn't demand our men to go through the picket line, so I go in to notify Mr. Hoiles to that effect.

And in the conversation I told him, I says, "We have no grievance with you, but the union has taken the stand they won't let the men go through a picket line, for the reason we are taking a chance they might be injured in some way."

Q. There was a picket line in front of this plant on this occasion? A. At that time.

Q. Was it the International Typographical Union's picket line? A. Right.

Q. Proceed.

A. In my conversation I stated to him that we wouldn't go through that line, and the minute the Typographical Union declared the strike off, either taking the picket line off, if they could get the picket line off in any way, our men was ready and willing to go back to work.

Q. What did Mr. Hoiles say? [350]

A. He said, "Well," he says, "it is a strike; you can't make nothing else out of it but a strike."

I said, "We don't term it that." I repeated again, if the line was off, we would send our men back to go to work in the stereotype department. He made

(Testimony of Clarence C. Liles.)

the statement that as far as the Typographical Union was concerned they would never go back.

Mr. Ryan: No further questions.

Trial Examiner Moslow: Read the answer.

(The answer was read.)

Cross Examination

Q. (By Mr. Sargent): Mr. Liles, do you recognize Mr. Juillard?

A. Well, I couldn't say positively whether he was in the office or not, but there was another gentleman in there with Mr. Hoiles, but I won't say positively it was him. Mr. Saleh could identify him because he knew him more than I did.

Q. It is possible you might have seen Mr. Juillard in the office of Mr. Hoiles at that time?

A. It is possible, yes. I will say this: There was another gentleman in there.

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Q. (By Mr. Sargent): Mr. Liles, when you were having this [351] talk with Mr. Hoiles, was Mr. Hoiles talking in a low or a high pitched voice?

A. Very low and very friendly.

Q. Very low and very friendly? A. Yes.

Q. And that was indicative of his attitude throughout the conference, was it not?

A. So far as I was concerned, yes.

Q. Yes. He didn't express any animosity or any

(Testimony of Clarence C. Liles.)

unfriendly feeling for your union because you boys were out, did he? A. Well, no.

Q. No. His attitude indicated he seemed to understand the position you boys were in. Is that it?

Mr. Ryan: I object as to what it seemed.

Trial Examiner Moslow: Objection overruled.

The Witness: Well, I would imagine he understood our position.

Q. (By Mr. Sargent): Yes. Now, when he made the remark to you about the Typographical Union, he said "would never come back." Are those the words he used? A. I believe it is, yes.

Q. He didn't say that in a threatening tone, did he? A. No, I wouldn't say he did.

Q. No. It was an expression on his part of what he believed would be the outcome in the development of the situation, [352] wasn't that it?

A. He didn't go into the situation of the Typographical Union in that respect.

Q. He didn't say to you that he or the management would never let the Typographical Union come back, did he?

A. I think I stated he made the statement that they would never come back.

Q. Of course, that statement is susceptible to a number of interpretations, Mr. Liles. If I spoke quietly and said, "They will never come back," it might mean that the Typographical Union wouldn't ever voluntarily come back. But if I said, "They will never come back," it might mean we will never

(Testimony of Clarence C. Liles.)

let them come back, and I am trying to get a shading from you as to what in truth was said.

A. Well, I might answer that my dealings with Mr. Hoiles, I believe with Mr. C. H. Hoiles, my dealings have been very pleasant, and I never heard him raise his voice.

Trial Examiner Moslow: This conversation was with C. H. Hoiles?

The Witness: Yes.

Q. (By Mr. Sargent): He raised his voice upon this occasion, did he? A. No.

Q. At the time when you had this talk with Mr. C. H. Hoiles, he expressed no unfriendliness about the Typographical Union, [353] did he?

A. Not to me.

Q. Nor to the individual members that had gone on strike?

A. Not to Mr. Saleh. Mr. Saleh was with me at the time.

Q. You would gather from his remark to you that there was a world of difference in the viewpoint between the management and the local Typographical Union. Is that right?

A. I didn't try to find out. That wasn't my business there.

Q. No, but when he said to you the remark, "They will never come back," you would glean there was a very wide difference of opinion between the local Typographical Union and the management. Is that right?

(Testimony of Clarence C. Liles.)

Trial Examiner Moslow: I don't believe his beliefs are important, Mr. Sargent.

Mr. Sargent: Well, your Honor, it is important solely because there is something that has been said here that is important, and it is susceptible to two equally possible interpretations.

Trial Examiner Moslow: Well, it would depend upon what Mr. Hoiles said, not on what this man believed.

Mr. Sargent: That is right. I have been asking Mr. Liles other questions from which it may be deduced which of the interpretations was meant by Mr. Hoiles. I will sum it up in this way.

Q. (By Mr. Sargent): Mr. Hoiles never said to you upon this [354] occasion, did he, Mr. Liles, that under no circumstances would he ever let the Typographical Union come back in the plant?

A. He didn't use the word he "wouldn't let them."

Q. Under no circumstances, that the Typographical Union——

A. I think I said he made the statement that the Typographical Union would never come back.

Q. That is susceptible again, I say, to several interpretations. One question more: When he made this remark to you was there any preface or any remark made after that by Mr. Hoiles, in anger, or in a manner of disparagement against the Typographical Union?

A. We didn't even go into it. I think I left Mr.

(Testimony of Clarence C. Liles.)

Hoiles very pleasant, when I walked out of his office.

Q. Your relationship is very pleasant with him today, isn't it, Mr. Liles? A. I hope so.

Q. I know from what he says his relations are with you too.

Trial Examiner Moslow: Anything further of this witness?

Mr. Sargent: That is all.

Mr. Ryan: I have nothing further.

Q. (By Trial Examiner Moslow): Does your union have a contract of any kind with the company?

A. No signed contract, no.

Q. Were your men working under union conditions though? [355] A. Yes.

Q. They had existed for a long time?

A. Well, I think we have been working with the Santa Ana Register for something better than 20 years, I imagine.

Trial Examiner Moslow: Anything else?

Mr. Ryan: Nothing.

Trial Examiner Moslow: You are excused.

Mr. Sargent: Just one minute.

Q. (By Mr. Sargent): Some time, when I am talking with Mr. Hoiles, he speaks so low it is kind of hard for me to understand. Have you had the same experience with him?

Mr. Ryan: I object. What has that got to do with it?

The Witness: I think I understand him.

(Testimony of Clarence C. Liles.)

Mr. Ryan: I object. What difference does it make about how he talked on any number of other occasions?

Trial Examiner Moslow: What did the witness himself answer before?

(The answer was read.)

Trial Examiner Moslow: I will overrule the objection.

Q. (By Mr. Sargent): You said he was talking very low this time. As a matter of fact, he does usually talk in a very low tone, doesn't he?

A. Well, you can understand him.

Q. And he was talking in a low tone this time when you had your talk with him on May 5, 1941? [356]

A. I always make a point, if I don't understand, I will ask for it again.

Q. I ask you whether or not Mr. Hoiles and you weren't discussing the circumstances under which the stereotypers would come back to work?

A. Yes. We had expressed that. That's why I was in there.

Q. Yes, and didn't you say, "Well, they can't come back until the typographical people come back"? A. I never made that statement.

Q. Until the picket line is off?

A. I made the statement that when the picket line was off we were ready and willing to go back in and go to work.

Q. And didn't one of you say something about

(Testimony of Clarence C. Liles.)

the picket line would be off when the typographical people came back? A. I can't remember that.

Q. You can't remember that. I ask you whether or not Mr. Hoiles' remark might not have been: "Maybe they will never come back," referring to the I.T.U., following a discussion with him as to when your stereotypers were going to come back. Might that not have been the case?

A. I know what I thought. I don't know what he thought.

Mr. Sargent: That is all.

Q. (By Trial Examiner Moslow): Have your men ever gone back? A. No.

Q. They haven't gone back since that date?

[357]

A. They are still out.

Trial Examiner Moslow: You are excused.

Redirect Examination

Q. (By Mr. Ryan): Was Mr. Saleh present during this conversation? A. Yes.

Mr. Ryan: That is all.

(Witness excused.)

Mr. Ryan: I would like to call Mr. William Lawrence as an adverse witness.

WILLIAM A. LAWRENCE

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ryan): Will you state your full name? A. William A. Lawrence.

Q. Where do you live? A. 4143 Bishop.

Q. In Santa Ana? A. Yes, sir.

Q. Are you employed by the Register Publishing Company in the composing room?

A. Yes, sir.

Q. How long have you been employed by that company? [358]

A. Since 1919; November, 1919.

Q. Have you ever been a member of the International Typographical Union? A. Yes, sir.

Q. In the month of April, 1941 were you a member of the International Typographical Union?

A. So far as I know.

Q. You were? Your answer is "yes"? Is that right?

A. I don't know whether I was a member in good standing. I don't know whether my dues were up to date or not.

Q. But at least you were a member?

A. Permitted to work.

Q. You are a foreman, as I understand it, of the composing room and were as of the date of April 30, 1941, and had been for some time?

A. Yes, sir.

(Testimony of William A. Lawrence.)

Q. Mr. Lawrence, did you have a conversation with Mr. Graham J. Albright at or about the time that the strike began, which would be the last day or so of April, or the first day or so of May, 1941?

A. I don't recall.

Q. Did you go out on strike? A. No, sir.

Q. You did not? A. No, sir. [359]

Q. Do you recall having a conversation with Mr. Albright at about the time I have mentioned, the last day or so of April, or the first day or so of May, 1941, in which you——

Mr. Sargent: Just a minute, Mr. Ryan. May I ask a preliminary question? Is this to show some admission on the part of the management?

Mr. Ryan: This is to bring out the gist of conversation he had with Mr. Albright.

Mr. Sargent: I object to any conversation which the witness had with anyone else, as being binding upon the management, for the reason your complaint specifically says any unfair labor practices or acts were through the two Hoiles, and nobody else. Your complaint so states, and I am, therefore, caught by surprise, and am going to have to object to anything else being brought in as an admission on the part of the management.

Trial Examiner Moslow: Before ruling on that, who is Graham J. Albright?

Mr. Ryan: He is another employee of the company.

The Witness: I beg your pardon?

(Testimony of William A. Lawrence.)

Mr. Ryan: He was, up to the time of the strike.

The Witness: I beg your pardon.

Mr. Ryan: He was not? Maybe I am wrong about that.

Trial Examiner Moslow: Who is he?

The Witness: He is an insurance man. [360]

Q. (By Mr. Ryan): He had worked for the company then? Is that right?

A. As I recall, Mr. Albright hasn't worked at the business for quite some time. He has, on occasion, in the years past worked once in a great while.

Q. Do you know what his occupation is now?

A. So far as I know he is an insurance man.

Q. Do you know whether he also has been a member of the International Typographical Union?

A. Yes.

Q. Do you remember having a conversation with him at the time I have mentioned, in which you discussed with him the reason why you didn't go out on strike? A. No, I do not.

Q. Isn't it a fact that you said this, or this in substance, to Mr. Albright:——

Mr. Sargent: Just a minute, Mr. Ryan, before you ask the question. Whatever the question is, I object on the ground it is not binding upon the respondent. It is not provided for in your complaint, as being in any wise an unfair labor practice, and no matter what the conversation shows, it doesn't have a bearing upon the issues of this case. What

(Testimony of William A. Lawrence.)

this gentleman did or didn't do, why he acted as he did, has nothing to do with the issues of the case.

Trial Examiner Moslow: I can't rule until I know what [361] was said. There is so much that could be said by this witness.

Mr. Sargent: May we go off the record first, and find out?

Trial Examiner Moslow: Very well. Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record. I will let you state your objection when you get to the question. Make your question. Make your record.

Q. (By Mr. Ryan): Mr. Lawrence, is it not a fact that on the last day or so of April, or the first day or so of May, 1941, you had a conversation with Mr. Albright in which you were discussing the reason for your not having gone out on strike, you made the following statement in substance and effect:——

Mr. Sargent: Before that goes in the record I object to any evidence being taken with respect to this upon the following grounds: First, that it is only alleged by the Board in its complaint that R. C. Hoiles and C. H. Hoiles, on behalf of the Register, did various things, and there is nothing in the testimony which we have gleaned from the off the record discussion to indicate that it relates to a conversation with either of them.

Second, that is hearsay.

(Testimony of William A. Lawrence.)

Third, that it has nothing to do with the issues of the [362] particular case, and fourth, can only result in unnecessary harm to the witness without any gain to anybody, so far as the case itself is concerned.

Trial Examiner Moslow: I will overrrule all of your objections.

Mr. Ryan: Read my statement as far as I have gone.

(The record was read.)

Q. (By Mr. Ryan): "The Register has me in a position where I cannot do differently, because I owe them $200; besides, I owe money in two banks and have other debts in Santa Ana; the management of the Register has made a proposition to me that only a fool would turn down."

Mr. Sargent: My objection, of course, covers that too.

The Witness: I don't remember making that statement, while there is some matter of fact in what you say, but I don't remember saying that to Mr. Albright or to anyone else.

Q. (By Mr. Ryan): Isn't it a fact the management of the Register Publishing Company did make you an offer to induce you not to go out on strike, but to remain at work for the company, and that you accepted the offer, and as a result are now working there and have been working there at all times?

Mr. Sargent: Same objection.

(Testimony of William A. Lawrence.)

Trial Examiner Moslow: Objection overruled.

The Witness: After the strike was on, yes.

Trial Examiner Moslow: Who made you the offer? [363]

The Witness: Mr. C. H. Hoiles. He didn't make any offer. He gave me an increase in wages a couple of days after. It wasn't an agreement or proposition.

Q. (By Mr. Ryan): Tell us, Mr. Lawrence, what the conversation was with Mr. C. H. Hoiles at the time he gave you the raise in wages.

A. I don't recall. He volunteered——

Q. Did he talk to you about the raise before he gave it to you?

A. No. He came up where I was working.

Q. What did he say to you when he came out to where you were working, Mr. Lawrence?

A. You want me to tell you how much money I am making?

Q. No, no. Just tell us what he said to you about this raise in wages. That is, how much did you receive at that time? You don't have to mention the exact salary.

Mr. Sargent: Which Mr. Hoiles?

The Witness: C. H. Hoiles. He said in effect: That your wages will be so much now; and that was all there was to it.

Q. (By Mr. Ryan): What percentage of increase did you receive over what you had been receiving? A. I haven't figured it out.

Trial Examiner Moslow: How much was it in dollars?

(Testimony of William A. Lawrence.)

The Witness: Per month? [364]

Trial Examiner Moslow: Yes.

Mr. Sargent: Mr. Examiner, you appreciate this took place after the strike, and after he had stayed in.

Trial Examiner Moslow: How much was it?

The Witness: It figured out something like $25 a month, in round figures.

Q. (By Trial Examiner Moslow): As foreman, were you getting the same wage as the other employees in the chapel, or were you getting a higher wage? A. I was getting a higher wage.

Q. Was your wage also fixed by the contract?

A. No.

Q. But you were required to be a member of the union under that contract, under the oral contract?

A. In order to do mechanical work.

Q. Did you do mechanical work?

A. Some.

Q. When the union was bargaining for an increase of wages from $1.00 to $1.15, would that have affected your wages in any way?

A. None whatever.

Q. Were your wages fixed at all by the oral agreement? A. No, sir.

Q. They were subject to private negotiations?

A. Absolutely. [365]

Q. (By Mr. Ryan) Mr. Lawrence, is it your answer that you did not make the statement that the management of the "Register made a proposition to me that only a fool would turn down," or

(Testimony of William A. Lawrence.)

is it your answer that "I can't remember having made that statement to Mr. Albright"?

A. I don't recall.

Q. Is it possible you did make that statement, if he says you did?

A. His memory might be better than mine.

Mr. Ryan: That is all.

Cross Examination

Q. (By Mr. Sargent) Mr. Lawrence, you say that Mr. Hoiles and you had a talk some time after the strike began?

A. Well, you could call it a talk, if you want to. We were all very busy, of course, and it occasionally came up, and he made the remark which I stated.

Q. When was that made to you?

A. I don't remember for sure. I don't remember the date, it was three or four days after the strike, or less; it might have been the second or third day. I don't remember.

Q. The second or third or fourth day after the strike? A. Yes.

Q. And you had voluntarily stayed on when the strike began? A. That is right.

Q. And this was something which the management had done [366] without any agreement with you after the occasion was over. Is that right?

Mr. Ryan: Mr. Examiner, I would like to point out that I called this witness as an adverse witness, and as such——

(Testimony of William A. Lawrence.)

Trial Examiner Moslow: Reframe your question.

Mr. Ryan: I am going to object to the question as leading.

Trial Examiner Moslow: Just reframe it.

Q. (By Mr. Sargent) Well, are we correct in understanding, Mr. Lawrence, that you voluntarily remained at work when the strike began?

A. Yes, sir.

Q. And that several days, meaning two, three or four days thereafter, Mr. Hoiles notified you that you would receive an increase in wages?

A. That is right.

Q. And that also was a voluntary act on the part of the management, as had been your act in staying on the job? A. That is right.

Q. When the people went out on strike on the night of Wednesday, April 30, 1941, were you on the job at that time?

Trial Examiner Moslow: Mr. Sargent, if you are going into new matter, in view of the lateness of the hour and for other reasons, I prefer that you would call this witness as part of your own case. You will have any privileges by way of cross examination that you would have if he had been called [367] by the Board.

Mr. Sargent: I was going to ask him only two questions, and probably not call him.

Trial Examiner Moslow: All right, then proceed.

Mr. Ryan: Will you read the question?

(The question was read.)

(Testimony of William A. Lawrence.)

The Witness: I was in the building.

Mr. Sargent: I will have to make it more than two. It will be very brief.

Q. (By Mr. Sargent) You and the members of the management had to more or less scour around and do everything yourselves, didn't you?

Mr. Ryan: It is immaterial. I object to it.

Trial Examiner Moslow: Don't argue. Objection overruled.

Q. (By Mr. Sargent): Is that right?

A. Yes, that is true.

Q. I ask you whether or not immediately after the strike your duties were increased or decreased as compared to what they had been before the strike?

A. Yes, my duties were increased considerably for a while.

Q. That lasted for some time, did it not?

A. Yes, it did.

Mr. Sargent: That is all.

Q. (By Trial Examiner Moslow) Did anyone else receive an increase besides you? [368]

A. I was the only one left.

Q. What do you mean?

A. Until we commenced hiring new help.

Q. You were the only one of the Register crew left?

A. That is right. Well, we had one boy, I think.

Q. There were 22 persons at the Register at the time of the strike?

A. I couldn't tell you how many there were.

(Testimony of William A. Lawrence.)

Q. All but you and one apprentice went out on strike. Is that correct? A. Yes.

Q. When were they replaced?

A. I don't think we brought any new help—we were able to get any new help until on the night of the first.

Q. At what date did you have a full complement of men? By what date were all the strikers replaced?

A. By Monday or Tuesday, following Wednesday or Thursday.

Q. That is, by May 5th or 6th, there was a crew of how many?

A. I couldn't tell you that without looking at my records.

Q. All right. Within a week, though?

A. I would say yes.

Q. Since that time have any of the strikers gone back to work? A. Yes.

Q. How many? [369] A. Two.

Q. Two others. What are their names?

A. Carl Thrasher and Cecil Stearns.

Q. When did Stearns go back?

A. Oh, it was the last part of June or around the first part of July, as I recall.

Q. 1941? A. Yes.

Q. And Carl Thrasher, when did he go back?

A. I think he came back the following Monday or Tuesday.

Q. Is that the same as C. C. Thrasher?

A. Yes.

(Testimony of William A. Lawrence.)

Q. He came back May 5th or 6th, then?

A. Along about there.

Trial Examiner Moslow: Anything else of the witness?

Redirect Examination

Q. (By Mr. Ryan) This Cecil Stearns, what was his capacity immediately preceding the strike, in the composing room? Was he a journeyman's apprentice? A. He was an apprentice.

Trial Examiner Moslow: Is that the boy you mean who came back?

The Witness: Yes.

Trial Examiner Moslow: You are excused.

(Witness excused.) [370]

Trial Examiner Moslow: Well, I will entertain a motion from either party to strike this man's name from paragraph 13 of the complaint.

Mr. Sargent: Cecil Thrasher?

Trial Examiner Moslow: No. W. A. Lawrence. Either one of you may have the privilege.

Mr. Ryan: I move to strike the name of William Lawrence from paragraph 13 of the complaint.

Trial Examiner Moslow: There is no objection?

Mr. Sargent: No.

Trial Examiner Moslow: That motion is granted. How about Mr. C. C. Thrasher? Does his name belong there?

Mr. Ryan: His name does not belong there, either, because the paragraph reads that the union

requested reinstatement for them on July 29th. He, of course, had gone back to work months before that, so I move to strike C. C. Thrasher from paragraph 13 of the complaint.

Mr. Sargent: No objection.

Trial Examiner Moslow: That motion is granted. Anything else?

(No response.)

Trial Examiner Moslow: We will recess at this time until 9:30 Monday morning.

(Whereupon, at 6:05 o'clock p. m., May 8, 1942, an adjournment was taken until Monday, May 11, 1942, at 9:30 a. m.) [371]

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Council Chambers, City Hall,
Santa Ana, California,
Monday, May 11, 1942.
9:30 o'clock a.m. [372]

Proceedings

Trial Examiner Moslow: The hearing will come to order.

Mr. Ryan: I wish to call Mr. Saleh to the witness stand, please.

EDWARD F. SALEH,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ryan) State your full name, please. A. Edward F. Saleh.

(Testimony of Edward F. Saleh.)

Q. Where do you live, Mr. Saleh?

A. Huntington Park, at the present time: 2516 Flower Street.

Q. In Huntington Park? A. Right.

Q. Were you ever employed at the Santa Ana Register?

A. I was a stereotyper there for a couple of years, journeyman-stereotyper.

Q. When did you begin to work and when did your occupation cease?

A. I can't remember the exact dates, but I was there for approximately two years previous to the time that the printers went on strike.

Q. Were you working for the company as of May 1, 1941 when the strike began? [374]

A. That is right.

Q. In what capacity?

A. As journeyman-stereotyper.

Q. Are you a member of any union?

A. Los Angeles Stereotypers Union, No. 58.

Q. On or about May 3, 1941 did you have a conversation with Mr. C. H. Hoiles in his office?

A. I did.

Trial Examiner Moslow: May 3rd?

Mr. Ryan: May 3rd.

Q. (By Mr. Ryan): On or about May 3, 1941, can you tell us how you happened to go into his office on that occasion?

A. As I remember it, I believe it was the last day I worked there, and someone, I don't recall who, came out during the afternoon and said the

(Testimony of Edward F. Saleh.)

boss wanted to see me in his office before I got away. So I went to see what it was, and there was C. H. and Ralph Juillard, the advertising manager, in there.

So they asked me what my intentions were regarding the decision of my union, whether or not I would go out, if I was instructed to do so, and I informed him I would.

Q. Your union wasn't on strike, was it?

A. No, they were not on strike, but they were contemplating refusing to let us go through the picket line.

Q. What picket line are you referring to? [375]

A. The Typographical picket line.

Q. Go ahead.

A. I told him I thought it was to my best interests to do what I was instructed to do by my union, and stay out. Well, he tried to make me see the other side of it, and told me that if I would stay that he would give a two or three year contract as, presumably, stereotype foreman in the shop.

Q. If you would stay?

A. If I would stay in, regardless of any instructions from my union. But I wasn't very much interested in that. I explained to him I still thought it would be to my best interest in the long run to go on out. Then he told me later on if at any time I desired to get back into the union, that they would pay my fine, any fine that was imposed on me, up to $1,000; but I still told him I thought in the long run I would be better off by going out.

(Testimony of Edward F. Saleh.)

Q. When you say "by going out", what do you mean?

A. By refusing to go through the picket line if instructed by my union, if and when; up to that time I had not been instructed to do so.

Q. When were you instructed in any manner by your union?

A. I believe this happened on Saturday, and the next day we were instructed by the president of the union not to go back to work after the following day. The following day would [376] have been Monday, which was not a day I worked regularly anyway. And that was the last time the stereotypers were allowed to go through the Typographical Union's picket line.

Q. Were you present in Mr. Hoiles' office at any time subsequent to this occasion you have just talked about, when Mr. Liles was also present?

A. Yes. Mr. Liles and I had talked with him together about the situation. I don't remember whether it was the day before or the day after this. I don't recall the exact date.

Q. Mr. Liles is who?

A. Mr. Liles is president of the Los Angeles Stereotypers Union, No. 58.

Q. Will you tell us who was present when you and Mr. Liles had a conversation with Mr. Hoiles?

A. I don't recall whether there was anyone else other than the three of us present or not.

Q. Was it in Mr. Hoiles' office?

A. It was, yes, and Mr. Liles was explaining

(Testimony of Edward F. Saleh.)

our situation to him, that in all probability the union would order us not to go through the Typographical picket line, for our own safety, as much as for anything else; and explained to him that the stereotypers would not in that case be on strike, just merely refusing to go through a picket line. And when and if the differences were settled between the office and the Typographical, the stereotypers would be glad to go to work [377] at whatever time the Typographical took their picket line away from the plant, we would be glad to come back to work.

Q. Did Mr. Hoiles say anything?

A. He did say, so far as the Typographical was concerned, they wouldn't be back to work. We told him whenever they took the picket line down there away from the shop, we would be eligible to come back to work.

Mr. Ryan: I have no further questions. You may cross examine.

Cross Examination

Q. (By Mr. Sargent) One question: The conversation when Mr. Liles was present, you say, took place a day or so earlier or later?

A. I don't recall the exact time. It was within a few days, within probably one or two days.

Q. But in any event it was a day or two after the strike began?

A. As I recall it, the picket line was already around the plant, yes.

Mr. Ryan: That is all.

Trial Examiner Moslow: You are excused. [378]

Trial Examiner Moslow: On the record.

I am going to make a ruling on the offer of the editorials. I will reject Board's Exhibits 11 and 12 until such time as the dates on which they are written are established.

Board's Exhibits 10-A, 10-B and 13 will be received in evidence for the limited purpose of the Board's offer. That is, for the light they shed on the views of Mr. R. C. Hoiles towards labor matters. I am not deciding, when receiving those editorials, that those views are necessarily the views of the management, nor that the mere fact that those views [405] were expressed, were identical positions taken in the bargaining negotiations.

(Thereupon the documents heretofore marked as Board's Exhibits 10-A, 10-B and 13, for identification, were received in evidence.)

BOARD'S EXHIBIT No. 10-A

Santa Ana Register, Friday, May 31, 1940

Sharing the Comforts of Life

By R. C. Hoiles

Printers Union Idea of Apprentices

The union printers make a great claim as to the service they render in training apprentices. They contend that their rules are for the purpose of benefitting the apprentice.

But these printers give no evidence of the wisdom of their action. They violate all the principles of all the economists and all business men

down through the ages. They violate the fundamental principle of the division of labor.

Five Years Drudgery

The printers require that every printer work for years setting type by hand or doing floor work before he dare have the right to operate a linotype that does practically all the type setting in a print shop. After a man gets on a linotype, many of them never again go back to hand composition. Any bright boy or girl could become efficient in six months or a year in running a straight matter linotype machine. It is just as reasonable to say that a linotype operator would have to carry papers for five years or be a reporter for five years or scrub floors five years, as it is to contend that they have to work five years on the floor before they dare even start to operate a linotype.

So it results down into the interpretation of the printers' love and guardianship of the apprentices. It means that the apprentice must be the serf of the union printers and absolutely give up his freedom and his rights to make mistakes and learn by making mistakes. So guidance claimed to be for the benefit of the apprentice means to the union printers control or tyranny over the life of the apprentice.

And instead of it really being love and service to their fellowman, it is a shortsighted method of the union printers making jobs at fictitious wages to linotype operators. It prevents thousands of people from becoming linotype operators who de-

sire to work a few years but do not care to spend five years in servitude in order to be of service to humanity in operating a machine. It thus greatly interferes with the free and natural division of labor without which there can be no high standard of civilization. This is because of the shortsighted view of the union printers that they are wise enough to run the lives of apprentices for five years.

It is little wonder that there are 15 million jobs short when the public permits unions to interfere with people learning to be efficient servants of humanity in this manner. It is little wonder that newspapers and printed matter cost as much as they do when this apprenticeship has stamped itself on to the public. The public always pays the bill and the consumers, 99 times out of a hundred, are other workers instead of rich people as defenders of collective bargaining would have the public believe.

The only difference between the printers' idea of controlling apprentices and Hitler or Stalin, is a matter of degree.

The columns of this paper are open for refutation if there has been any misstatement.

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BOARD'S EXHIBIT No. 10-B

Santa Ana Register, Friday, May 31, 1940

German Armistice

Like Union Contract

Anyone who has had experience in reading union

contracts, recognizes the similarity between the German terms of peace to France and a union contract.

Germans, like the unions, demand everything and agree and promise to do nothing.

All union contracts are simply options. The purpose of the union contract is to rob the consumers and treat them as serfs and slaves and take away from them their inalienable rights, just as the Armistice agreement with France takes away from the French citizens their inalienable rights and makes them support the Germans.

The reason union contracts rob the customers is that it is a law of business life that sooner or later every advantage or disadvantage has to be passed on to the customer. So when unions demand and receive more, under the threat of striking, for the labor they perform than thousands of customers are willing and able to do the same service for they are making serfs of the customers.

Some printers unions used to have the following in their contracts: The publisher shall perform no act that might be construed to hurt the printer's trade union.

If a publisher had a share of stock in another company that was not satisfactory to the union, they had a right to call a strike; or, if he belonged to a church organization that stood for an open shop, the union had a right to call a strike. They, of course, seldom enforced their right because it was so raw and tyrannical that the public would not stand for it.

The result of union contracts in America that takes away the initiative of workers and robs those excluded from having the right to receive the fruits of their labor, if carried on to its final culmination, will result in as much tyranny in America as exists now and will exist in France.

We do not need to go to Europe to fight tyranny and oppression. We have plenty of it here in America.

The columns of this paper are open for any defender of collective bargaining who will answer questions to refute the above conclusions.

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Mr. Sargent: In view of your ruling to let in the three editorials, and I take it the other two——

Trial Examiner Moslow: I am not making a ruling until I see when the other two were written.

Mr. Sargent: As soon as you have the dates, I take it——

Trial Examiner Moslow: No. I want to know when they were written. I want to see the relationship to the conferences, if any.

Mr. Sargent: If you deem the dates in any wise synonymous you will admit them; but if you find the dates a long ways apart your reaction would be to reject them?

Trial Examiner Moslow: That would probably be my ruling.

Mr. Sargent: If we are going to have to fight the entire question of the editorials, I have no dis-

position to make it difficult for my friend, Mr. Ryan, in view of the fact the hearing will probably end today; and I am not disposed, if you are going to let in the other ones, to keep the two out simply because they have no date on them. In other words, I would like to have the editorials viewed as a whole. I have made my objection to all the editorials. Therefore, I won't object if you Honor sees fit to put these two without [406] dates on them, to them, simply because there wasn't a date on them.

Trial Examiner Moslow: I am not disposed to receive them despite your waiver of objection as to the dates until the date is established. I might point out the undated editorials, in addition, bear much less, show much less connection to the subject matters under discussion in the collective bargaining negotiations than the ones which are dated. They seem, more than the others, a general expression of views.

Let us proceed. Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

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C. H. HOILES,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ryan) Will you state your full name, please? A. Clarence H. Hoiles.

(Testimony of C. H. Hoiles.)

Q. Where do you live?

A. 2010 Victoria Drive.

Q. Santa Ana? A. Santa Ana.

Q. California. Are you connected in any way with the [407] Register Publishing Company, Ltd.?

A. I am.

Q. What is your capacity with that corporation?

A. Secretary-treasurer, and business manager.

Q. How long have you held that position?

A. Since 1935.

Q. Do you have any other position with the company? Are you a director?

A. Director.

Q. Who are the other directors?

A. Mr. R. C. Hoiles.

Q. Do you have any relation to him other than that, the fact that he is a director?

A. He is my father.

Q. He is your father. And are there other directors?

A. Yes; Mabel M. Hoiles, Harry H. Hoiles, Mabelle S. Hoiles, Earl J. Hanna. I think that is it.

Trial Examiner Moslow: Will you give the relationship of the other Hoiles you have mentioned?

The Witness: Mabel M., mother.

Trial Examiner Moslow: Harry H.?

The Witness: Brother.

Trial Examiner Moslow: Your brother?

The Witness: Yes.

Trial Examiner Moslow: Mabelle S.? [408]

(Testimony of C. H. Hoiles.)

The Witness: My wife.

Trial Examiner Moslow: Has Earl J. Hanna any relationship to you?

The Witness: No.

Trial Examiner Moslow: There are six directors.

The Witness: Yes.

Q. (By Mr. Ryan) Mr. Hoiles, the Register Publishing Company, Ltd. is and at all times since 1927 has been a corporation organized and existing under and by virtue of the laws of the State of California. Is that a true fact? A. Yes.

Q. The Register Publishing Company, Ltd. has been owned and controlled by the present owner since 1935. Is that right? A. Yes.

Q. The Register Publishing Company, Ltd. has no parent company, no subsidiary, and no branches. Is that correct? A. That is right.

Q. The Register Publishing Company, Ltd. is engaged in the business of publishing and distributing a newspaper "Santa Ana Register" daily except Sunday at its place of business located at 519 North Sycamore Street, in the city of Santa Ana, State of California. Is that a true fact?

A. Yes.

Q. The Santa Ana Register Publishing Company, Ltd. during [409] the year 1940 had approximately 15,032 subscriptions to its newspaper, "Santa Ana Register", of which number about 59 were located outside the State of California. Is that a true fact? A. That is right.

(Testimony of C. H. Hoiles.)

Trial Examiner Moslow: 15,032?

Mr. Ryan: 15,032.

Q. (By Mr. Ryan) Is it also a fact that the subscription ratio is approximately the same at the present time? A. That is right.

Q. The Register Publishing Company, Ltd.——

Trial Examiner Moslow: Just a second. You mean by subscription ratio, the ratio of those outside the State?

Mr. Ryan: Yes.

Q. (By Mr. Ryan) And the numbers are also about the same, isn't that true, the total subscriptions? A. That's now?

Q. Yes. A. It is a little bit more.

Q. With respect to the number outside the State?

A. The ratio remains about the same.

Q. Register Publishing Company, Ltd. during the year 1940 purchased news print in the amount of 1,431,000 pounds at a cost of $34,636.10, and said news print was shipped via railroad and boat from Canada to Santa Ana, California where [410] it was used in the production of the newspaper "Santa Ana Register." Is that a true fact?

A. Yes.

Q. Is it also a true fact that that is approximately the amount of news print which is being purchased at the present time on a yearly basis?

A. Just—approximately, yes; just a little bit more, probably, now.

Q. And from the same source? A. Yes.

(Testimony of C. H. Hoiles.)

Q. And it comes in from Canada the same as it did in 1940. Is that right? A. Yes.

Trial Examiner Moslow: Did all of your news print come from Canada?

The Witness: News print, yes.

Q. (By Mr. Ryan) The Register Publishing Company, Ltd. during the year 1940 purchased miscellaneous materials, supplies, machines, and equipment for use in its business from sources located outside the State of California, in the total amount of approximately $7,000, and the aforesaid materials, supplies, machines and equipment were shipped from said sources located outside the State of California to Santa Ana, California via railroad. Is that a true fact? A. Yes. [411]

Q. And is the figure with respect to the purchases of the miscellaneous materials, supplies, machines and equipment approximately the same now as they were at that time, with respect to the amount coming in from out of the State? A. Yes.

Q. Register Publishing Company, Ltd., regularly receives news for publication and does publish in its newspaper, Santa Ana Register, news from United Press, Associated Press, and Internaional News Service, the greater part of which is gathered outside of and transmitted into the State of California by the aforementioned news services, but all of which is received by the Register Publishing Company, Ltd., through the Los Angeles and San Francisco offices of the aforementioned news services. Is that a true fact, so far? A. Yes.

(Testimony of C. H. Hoiles.)

Q. The aforesaid news constitutes approximately 12 per cent of the total news regularly appearing in the newspaper Santa Ana Register. Register Publishing Company, Ltd., pays to the aforementioned news services a total of approximately $7,200 annually for supplying the aforesaid news. Is what I have just read true? A. Yes.

Q. Register Publishing Company, Ltd., subscribes to the following newspaper feature services: Chicago Tribune, New York News Syndicate, Inc., News Building, New York, New [412] York; McNaught Syndicate, Inc., 1475 Broadway, New York City, New York; King Features, 235 East 45th Street, New York City, New York; Bell Syndicate, Inc., 247 West 43rd Street, New York City, New York; NEA Service, Inc., 1200 West 3rd Street, Cleveland, Ohio. Is that a true fact?

A. Yes, that is.

Q. The Register Publishing Company, Ltd., regularly publishes in its newspaper, Santa Ana Register, a miscellany of newspaper features, such as: comic strips, cartoons, and feature articles, approximately 90 per cent of which are transmitted to the Register Publishing Company, Ltd., at Santa Ana, California, from states other than California, by the aforenamed feature services. Is that a correct statement? A. Yes.

Q. The aforementioned material constitutes approximately eight per cent of the reading material in the Santa Ana Register newspaper. Is that a correct statement? A. Yes.

(Testimony of C. H. Hoiles.)

Q. The Register Publishing Company, Ltd., annually pays the aforesaid feature services a total of approximately $3,200 annually for supplying the aforementioned material. Is that a correct fact?

A. Yes.

Q. Said material is received via the United States Postal Service. Is that a true statement, Mr. Hoiles? [413] A. Yes.

Q. The gross annual revenue of Register Publishing Company, Ltd., is in excess of $300,000, of which amount in excess of $200,000 represents revenue derived from advertising, and in excess of $100,000 represents revenue from newspaper circulation. Is that a true statement, so far, Mr. Hoiles? A. Yes.

Q. Register Publishing Company, Ltd., receives approximately six per cent of its total revenue from national advertising which it obtains from companies whose offices and places of business are located outside the State of California. Is that a true statement? A. Yes.

Q. Is it also a true statement that said national advertising is transmitted to you from those companies located outside the State?

A. From companies and agencies, yes.

A. In respect to the matters referred to above, there has been no substantial change since 1940 in the nature of the business operations of Register Publishing Company, Ltd.? Is that correct, Mr. Hoiles, in respect to these things I have just asked you about?

(Testimony of C. H. Hoiles.)

A. Except national advertising has been steadily going down.

Mr. Ryan: It has been going down somewhat. That is all. [414]

Trial Examiner Moslow: I understand, Mr. Sargent, you contend the respondent is not subject to the jurisdiction of the Board?

Mr. Sargent: Yes, I do, Mr. Examiner.

Cross Examination

Q. (By Mr. Sargent): Has the drop in national advertising of the Register been one which is in line with and shared by papers throughout the nation?

A. Yes.

Q. And that drop in national advertising is attributable to the present national emergency?

A. That is right.

Q. Mr. Ryan asked you with regard to the six per cent of the total revenue coming from national advertising, and I understood you to answer that the companies from which you received that national advertising had offices and places of business outside the State of California; and I take it none of that advertising, therefore, comes through California offices to you?

A. The six per cent comes from the companies, offices, or agencies outside the State of California.

Q. Am I correct in understanding that the newspaper feature services, five in number, about which Mr. Ryan asked you, are the same ones referred to by him for which you said you paid $3,200 annaully? [415] A. Yes.

(Testimony of C. H. Hoiles.)

Q. In other words,——

A. You mean the feature services?

Q. Yes. In other words, the feature services of the Chicago Tribune, McNaught, King Features, Bell Syndicate, NEA, are the ones which you said cost you $3,200 annually? A. Yes.

Q. And constitute about eight per cent of the reading material in the newspaper? A. Yes.

Q. Mr. Hoiles, further on the question of jurisdiction, the strike commenced on April 30, 1941, did it not? A. Yes.

Q. Have you been attending, day after day, your office, since that time, with a few exceptions?

A. Yes, I have, yes.

Q. And your office is in the newspaper plant?

A. That is right.

Q. Have you, then, had occasion during various parts of the day, and sometimes in the evening, to observe whether or not pickets were stationed outside the building since that time? A. Yes.

Q. I ask you whether or not the Register plant is not located on a corner?

A. That is right. [416]

Q. And on what corner of what two streets?

A. Sixth and Sycamore, the southeast corner.

Q. Now, have you been able to observe since the commencement of the strike whether or not there have been continuous picket lines on either the Sixth or Sycamore Street entrances of the Register?

Trial Examiner Moslow: Do you contend, Mr. Sargent, this relates to the question of jurisdiction?

(Testimony of C. H. Hoiles.)

Mr. Sargent: Yes. I will tie it up. In other words, I am going into the second part of the question as to the effect of a labor dispute here upon the labor dispute generally.

Mr. Ryan: I want to have an objection to this line of questions, particularly because I can't see any relevancy.

Trial Examiner Moslow: How long will you be on this?

Mr. Sargent: Enough so I will have quite a few questions to ask.

Trial Examiner Moslow: I don't understand your point. How does it relate to the question of jurisdiction?

Mr. Sargent: Mr. Examiner, as you undoubtedly know and as I am prepared to show you by cases, the question of jurisdiction is not primarily whether or not one has raw materials come from interstate commerce, or whether a small portion of the circulation of the newspaper goes outside the State, or whether news comes from the outside, or feature [417] services come in, or national advertising comes in. Those are all small in issue. The true criterion has seemed to be, in the cases, as to whether or not a dispute within the walls of the plant, particularly where it is a small newspaper, as here, have a close, intimate bearing upon the flow of commerce in the territory, and whether or not that dispute tends to disrupt deliveries, has an effect upon other labor unions who would be involved in deliveries.

In other words, as the Santa Cruz Packing Com-

(Testimony of C. H. Hoiles.)

pany case said, the test is whether or not the labor dispute has a bearing which has repercussions of importance and substance upon the operations of this company, and upon the other services which are involved in it.

And I am seeking to show now that so far as this paper is concerned, it has been subject to this strike, in whole or in part, for over a period of a year, and there has been no such effect.

Trial Examiner Moslow: I disagree with any such evidence as material on this question. However, since it is jurisdictional I will allow you to proceed.

Mr. Sargent: Yes.

Q. (By Mr. Sargent) Now, Mr. Hoiles, were you able to observe during this past year, since the date of the strike, whether pickets have continuously been around the Sixth Street and Sycamore Street entrances to the respondent's plant? [418]

A. I have.

Q. And were the picket lines continuously maintained on those entrances?

A. No, they were not.

Q. I ask you whether or not there have been considerable lapses of time when there have been no pickets seen on either of the two entrances?

Mr. Ryan: I object on the ground it is indefinite, what is meant by considerable lapses of time.

Mr. Sargent: I will ask the witness to enlarge upon it.

(Testimony of C. H. Hoiles.)

Trial Examiner Moslow: So far as I am concerned, this entire line is immaterial.

Mr. Ryan: That is what I objected to.

Trial Examiner Moslow: For all practical purposes I am receiving it as though it were an offer of proof. So, I am not disposed to pay much attention to your objection, Mr. Ryan. Proceed. You may answer the question.

The Witness: May I have the question, please?

(The question was read.)

The Witness: You have reference to the Sixth or the Sycamore Street entrances? Which are you talking about?

Q. (By Mr. Sargent) Either of the entrances. I will put it the Sixth and Sycamore Streets.

A. Since December 7th, about 90 per cent of the time there have been no pickets. [419]

Trial Examiner Moslow: Since December 7th, 1941?

The Witness: 1941.

Q. (By Mr. Sargent) And prior to December 7, 1941 were there days when there were no pickets around either of those entrances to your plant?

A. Yes.

Q. Now, since the strike began, has the strike caused you to be unable to obtain raw materials?

A. No.

Q. Has it had any effect upon your national advertising? A. No.

Mr. Ryan: I object to that question.

(Testimony of C. H. Hoiles.)

Trial Examiner Moslow: You have a general objection to this entire line.

Q. (By Mr. Sargent) Has it had any effect upon your feature services? A. No.

Q. Has it had any effect upon your news services or the news or information coming from them?

A. No.

Q. Has it had an appreciable effect upon your local advertising? A. No.

Q. Has it had an effect upon your circulation?

A. No. [420]

Q. Has it had any effect upon your small out of state circulation? A. No.

Q. Has it had any effect upon the local operations in your plant, other than for the short period during which you had to replace those who were formerly employed and went out on strike?

A. Just several days after the strike, that was all, in the first week of the operation of the composing room.

Q. Except for that period, has the strike had any effect upon the normalcy of the operations?

A. It has not.

Q. In order that the full story may appear, the bitter and the sweet, the good and the bad, how was the paper gotten out immediately after the night shift went off on the 30th of April, 1941?

A. Do you want me to tell the story?

Q. Briefly, yes.

A. That night there was no attempt, after the night shift went off, to try to get the paper out.

(Testimony of C. H. Hoiles.)

We all figured we had better get some sleep, so we went home and got a good night's sleep, for the next day. Various offices in the organization, in the advertising department and the editorial department, and the foreman, and the apprentice, and the advertising manager and myself, all pitched in and put out [421] a semblance of a paper.

Q. And then, how soon thereafter did you employ other printers to come in and get out the paper?

A. Oh, from time to time within the week, three or four days, the printers came in.

Q. I ask you whether or not except for that period of time the strike has had any appreciable effect upon the normal business operations or relations of the paper?

A. After that time we went along about as normal.

Q. And did you subsequently secure the services of another stereotyper?

A. After the stereotyper refused to come through the picket line, yes.

Q. How many stereotypers were there?

A. There was one journeyman full time, one journeyman part time, and one apprentice.

Q. Yes. And after they had refused to come through, you employed others to take their position. Is that right? A. Yes, sir.

Q. Has that situation become normal since that time? A. Yes, sir.

Mr. Sargent Do I understand now, Mr. Ryan,

(Testimony of C. H. Hoiles.)

following the cross of Mr. Hoiles upon the questions I have asked him, the Board then rests?

Mr. Ryan: Yes. I guess that is a correct statement, [422] other than, of course, we have the question of this contract which was in effect between the company and the Santa Ana Union between 1937 and 1939 and which was subsequently extended, I believe, until at least March, 1940, and we are trying to get that.

Mr. Sargent: I assume if anything is done, we will probably have to do it through Mr. Hoiles, ourselves, because your witnesses are not in a position to make any comparison. So, if the contract comes in, it will have to come in by comparison between Mr. Hoiles and the foreman, to ascertain what the contract is.

Trial Examiner Moslow: You needn't be technical about that reservation. You have the right to introduce it at any time. You can rest, and introduce it in respondent's case, or in rebuttal, or any way you want to. The same applies to your two editorials.

Mr. Sargent: I take it, then, the Board's case is not yet closed, but will be as soon as this cross examination is complete. I have a few more questions, other than on jurisdictional questions which I would like to ask Mr. Hoiles, although I am making him my own witness for the purpose of those questions, before I make a motion; and those questions will relate in substance to certain things which have

(Testimony of C. H. Hoiles.)

already been testified to and which I would like a denial of before I make the motion. [423]

Trial Examiner Moslow: I would prefer that you treat your case on the merits after the Board has rested.

Mr. Sargent: I take it that, much as I don't want to displease you, if I do ask Mr. Hoiles questions now, it will be like any witness that I am making my own, and asking him those questions, but I still have the right to ask questions while he is on the stand now. Is that right?

Trial Examiner Moslow: No. I think it is subject to my discretion. The record will be more orderly if we finish the Board's case, before you go on with yours.

Mr. Ryan: I just have a couple——

Trial Examiner Moslow: I would rather have your denials as part of your own case.

Mr. Sargent: I would assume we would adjourn, very probably for lunch; and I ask that you reserve ruling, for a reason I will give you after lunch.

Trial Examiner Moslow: You don't have to make any motion at the conclusion of the Board's case, and your failure doesn't indicate any waiver of any rights.

Mr. Sargent: I understand that.

Trial Examiner Moslow: I don't see what importance you attach to making a motion at this particular time. As far as I am concerned it might just as well be made at the end of the entire case. Even then I would like the Board to rest before

(Testimony of C. H. Hoiles.)

you put on your case. It makes an easier record. [424]

Mr. Sargent: I am trying to cooperate with you on what you said last Friday night, and to get through with the case as soon as possible. What I am doing now is a very definite move in that direction.

Trial Examiner Moslow: You think it might be possible, by reason of this testimony, to get through the case quicker?

Mr. Sargent: Yes, it undoubtedly would be.

Trial Examiner Moslow: How long will you be?

Mr. Sargent: Perhaps 15 or 20 minutes.

Trial Examiner Moslow: Let us continue.

Mr. Ryan: Mr. Examiner, if he proposes to go into the merits of his case this afternoon with this witness, I want it clearly understood that I have rested the Board's case in between time, before he begins that; but I want to ask the witness a couple of questions myself.

Trial Examiner Moslow: Why not finish on the jurisdictional matter and then you can continue? I have several questions too.

Mr. Ryan: You are through on the jurisdictional questions, Mr. Sargent?

Mr. Sargent: Yes.

Redirect Examination

Q. (By Mr. Ryan) Mr. Hoiles, as of the period immediately preceding the strike, which began on or about May 1, 1941, I believe, your company was

(Testimony of C. H. Hoiles.)

also subscribing to a news feature [425] service of the United Features, 220 West 42nd Street, New York, New York. Is that right? A. It was.

Q. And as I understand it, your company no longer subscribes to that particular feature service?

A. That is right.

Q. When did you cease to subscribe to that company's services, approximately?

A. Oh, approximately 10 or 11 months ago.

Q. And how long had you been subscribing to it when you ceased? A. About a year.

Q. What articles did you receive from that reature service?

A. That was General Hugh Johnson.

Q. Did you receive any other features from them other than the Johnson column?

A. I think that that was the only column we received from the United Features.

Q. Are you and your father, Mr. R. C. Hoiles, co-publishers? Is that the way you are known, as to the publishers of the Santa Ana Register?

A. That is right.

Mr. Ryan: I have no further questions of the witness.

Q. (By Trial Examiner Moslow) Who were the stockholders of this company? Are there many or few? [426]

A. They are primarily identical with the board of directors.

Q. Does your father control the corporation?

A. He does not.

(Testimony of C. H. Hoiles.)

Q. Do you and your father together own the majority of the stock?

A. I couldn't exactly tell; pretty close.

Q. Did you say "pretty close"?

A. I would say "R. C." and myself together own somewhere around half. I don't know whether it is over or under.

Q. Now, when your family assumed control, in 1935, did you buy out the shares of stock of the existing stockholders, or was a new corporation formed? A. The existing corporation.

Q. In other words, the Register Publishing Company, Ltd. had been publishing the paper before 1935? A. It had.

Q. And do you know for how long a period?

A. There were several changes of names of the corporation, back in about 1928; it changed back and forth, and I don't recall exactly when the Register Publishing Company Ltd. became the entity. It was the Register Publishing Company, then it was the Orange County Publishing Company; then it was the Register Publishing Company, Ltd., I believe.

Q. At any rate, for several years before you took control it was published by a corporation known as the Register [427] Publishing Company?

A. Right.

Q. Are you yourself a member of the Associated Press and these other wire services? Your paper, rather. A. The paper is, yes.

Q. Now, do you yourself contribute news to the

(Testimony of C. H. Hoiles.)

Associated Press, which is then wired throughout the rest of the country?

A. A member of our staff contributes the news.

Mr. Sargent: Just a minute, Mr. Examiner. I don't know that the witness understands the import of your question.

Q. (By Trial Examiner Moslow): I will ask him again: I understood that members of the Associated Press, in addition to receiving news from the A.P., in addition to what it carries, would send news to the A.P., which was then wired throughout the country. Is that correct?

A. That is correct.

Q. How much of your news is sent to the A.P. wires?

A. Oh, I think our correspondent was complaining that he got around $2.50 or $3.00 a month, and he didn't figure it was worth while.

Q. He himself is the only one paid for it?

A. Yes, sir.

Q. And that is all he gets for it?

A. That is right.

Q. You said you didn't attempt, on the night of April 30th, [428] to get the paper out. When does the paper normally appear on the streets?

A. It normally appears around 2:15 or 2:30 in the afternoon.

Q. What paper were you working on, on the night of April 30th?

A. Oh, we have two shifts, a day shift and a night shift.

(Testimony of C. H. Hoiles.)

Q. Both worked on the same daily edition?

A. The night shift handles primarily, the advertising of the next day.

Q. Did the paper appear on the afternoon of that day? A. It did.

Q. But you did that with the make-shift crew, on the morning of May 1st?

A. All during May 1st.

Q. So that there wasn't any stopping of any issue? A. No, sir.

Q. The issues were continuous?

A. That is right.

Q. The printers you now employ are not members of the I.T.U.?

A. I don't know. I never asked them.

Q. At any rate, it is not a condition of their employment that they be members of the I.T.U.?

A. That is right. [429]

Trial Examiner Moslow: Anything else?

Mr. Sargent: I want to ask one or two more questions.

Mr. Ryan: May I ask him a question, Mr. Sargent, before you proceed?

Q. (By Mr. Ryan): In this edition of the paper you got out on the first day of the strike, with this make-shift crew, was it a full paper, the same as you usually got out?

A. I think the sports page was eliminated and maybe one or two of the other customary pages.

Q. That was the extent of the limitation?

(Testimony of C. H. Hoiles.)

A. It was two to four pages light of a normal issue.

Mr. Ryan: That is all.

Recross Examination

Q. (By Mr. Sargent): Now, with respect to the Associated Press, Mr. Hoiles, your paper is a regular member of the A.P., isn't it?

A. That is right.

Q. And as I understand it, the A.P. system, you will correct me if I am wrong, the news comes to you from either the Los Angeles or the San Francisco office of the Associated Press. Is that correct? A. That is correct.

Q. And that the Associated Press designates in your plant some one of your employees who also acts as the agent of the Associated Press in collecting information for it. Is that [430] right?

A. That is right.

Q. And that is the agent you say got about $2.00 or $3.00 a month, and thought it was hardly worth while? A. That is right.

Q. Now, then, when he collects this news as, for example, something of interest in Santa Ana, he wires this to the Los Angeles or San Francisco office of the Associated Press. Is that correct?

A. He sends it to the Los Angeles office.

Q. Los Angeles office. In other words, so far as both incoming and outgoing news, from the viewpoint of your plant, that is, news that comes from the Associated Press to your plant and news from

(Testimony of C. H. Hoiles.)

this particular Associated Press agent in your plant to the Associated Press office in Los Angeles, all of those are communications solely within the State of California. Is that right?

A. That is right.

Q. And you have no direct outside connection with the out of state offices of the Associated Press?

A. No, just Los Angeles and San Francisco.

Q. Now, with respect to these editorials which were published by your father, I ask you whether or not there has been a practice to open the columns of the paper to those who wished to either answer or make corresponding comments? [431]

Trial Examiner Moslow: Mr. Sargent, I think the evidence on the editorial situation is in the last sentence: That persons who hold different views are invited to answer.

Mr. Sargent: I only have one question, because as a matter of fact I am prepared to show that one gentleman who is a witness in the case did do that.

Trial Examiner Moslow: Continue.

Q. (By Mr. Sargent): Is that true, Mr. Hoiles?

A. That is true.

Q. I ask you whether or not any gentleman who has testified in the case has exercised that privilege of having articles appear under his name in the column? A. Mr. Duke has.

Q. Once, or more than once?

A. Two specific times that I know of.

Q. Yes. Now, is there a difference between the operating costs and the general conditions of print-

(Testimony of C. H. Hoiles.)

ers in a job printing plant, and a newspaper plant and composing room, such as that of the Register?

A. Yes.

Q. What are they, please?

Mr. Ryan: I object.

Trial Examiner Moslow: Objection overruled. The answer may stand.

Q. (By Mr. Sargent): What are the differences as they affect [432] a contract between the union for the employees of the two, and the owner of either the plant or the newspaper?

A. Well, the newspaper plant is more continuous. The paper is published every day and the printers are needed every day. The work is not as elaborate as any job plant. A job plant is dependent upon the jobs as they come in. If there is a rush, possibly they are having a rush today and a famine tomorrow.

Q. And is there a difference in the actual costs of printing regularly and having an order one day and none tomorrow?

A. We have certain costs whether we have the income or not. The job plant usually has costs prevalent upon certain orders, which is based on income.

Q. Yes. Did you give William Lawrence, the foreman in the Register, his raise in pay?

A. Yes, sir.

Q. What reason did you have for giving him that raise in pay?

A. He was taking on more responsibility.

(Testimony of C. H. Hoiles.)

Q. And that came when?

A. That came four or five days after the strike.

Q. And have the increased duties of Mr. Lawrence continued?

A. They have been continuous, yes, sir.

Q. Do you know at the time of the strike how many combination men there were in your composing room? [433]

A. We only had one man working at it, Mr. Bray.

Q. Mr. Bray; and I ask you whether or not he was a regular or a sub?

A. He was what is known as a sub.

Q. Would a sub mean a substitute who is called when extra work is required, but who is not on the regular payroll?

A. He doesn't have what they call a situation. He is called when one man lays off, or for additional reasons.

Q. And by a "situation" you mean a regular job, day after day, so many days a week?

A. That is right.

Mr. Ryan: Mr. Examiner, I want it understood that I rested my case at the close of the last question that I asked Mr. Hoiles about this one feature service.

Trial Examiner Moslow: I don't see it makes any difference. You might just as well rest when the witness is through.

Mr. Ryan: It looks like Mr. Sargent may be going into the merits.

(Testimony of C. H. Hoiles.)

Mr. Sargent: It won't be very long.

Trial Examiner Moslow: No definite harm will be done, in any event.

Q. (By Mr. Sargent): Is Jane Hoiles the daughter of R. C. Hoiles? A. That is right.

[434]

Q. And——

Trial Examiner Moslow: That is your sister, in other words?

The Witness: That is right.

Q. (By Mr. Sargent): And was there a time when she came to work, one summer, upon the paper, and worked in the composing room?

A. Yes, sir.

Q. Was that during the existence of the verbal contract with the union? A. Yes, sir.

Q. Did the union make any objection to her working on the linotype machine? A. No, sir.

Trial Examiner Moslow: What is the answer?

The Witness: No, sir.

Trial Examiner Moslow: Keep your voice up.

Q. (By Mr. Sargent): And was her work used in the newspaper? A. Yes, sir.

Trial Examiner Moslow: How long did she work there?

The Witness: During the whole of one summer.

Q. (By Mr. Sargent): I ask you whether or not that was the first time she ever worked in the composing room or was it not?

A. I think it was the first time.

(Testimony of C. H. Hoiles.)

Q. And she worked at the linotype machine, you say, while [435] she was there? A. Yes.

Trial Examiner Moslow: Was she paid for this?

The Witness: I don't know whether she was. I think she was.

Trial Examiner Moslow: You think she got some pay for it?

The Witness: I don't know how much it was. I think she got some pay for it.

Q. (By Mr. Sargent): During the existence of this oral contract, from 1937, as has been testified, up to the negotiations and strike in 1941, did the Register, the respondent, live up to that contract?

Mr. Ryan: I object to that as calling for a conclusion; immaterial.

Mr. Sargent: We have had opinion evidence on the other side, and I thought it only wise to ask.

Trial Examiner Moslow: Let him state whether in his opinion the respondent lived up to it.

The Witness: What is the question now?

Q. (By Mr. Sargent): In your opinion, did the Register live up to the oral contract with the union during its existence? A. Yes, sir.

Q. When the union in 1940 and 1941 made proposals to you during the negotiations, what consideration did you give to those proposals? [436]

A. Due consideration.

Q. I ask you during this time who was in charge of the labor relations for the respondent?

A. I have been.

Q. What? A. I was.

(Testimony of C. H. Hoiles.)

Q. At all times? A. Yes, sir.

Trial Examiner Moslow: How old are you, Mr. Hoiles?

The Witness: Thirty-six.

Q. (By Mr. Sargent): Mr. Hoiles, this verbal contract, which we are going to discuss after lunch, had a great many separate divisions or sub-sections?

A. Oh, yes.

Q. It was a detailed operating contract, was it not? A. Yes, sir.

Q. And I ask you at this time: Did it have the usual provision for a closed shop?

A. Yes, sir.

Q. In other words, without the consent of the union, no one who was not a member of the union in good standing could work as a printer in the shop. Is that correct? A. That is right.

Trial Examiner Moslow: That is in the composing room.

Mr. Sargent: In the composing room, yes. [437]

Mr. Ryan: Except in violation of the contract.

Trial Examiner Moslow: Let us not argue about that.

Mr. Sargent: I said without the consent of the union.

Q. (By Mr. Sargent): Now, in 1940 the testimony of the union representatives is that they were discussing the following subjects: Wages, apprentices, starting time, lower wages for straight matter men, vacations, and less than a full day's wages for

(Testimony of C. H. Hoiles.)

a part of a day's work; those all were matters discussed in 1940? A. That is right.

Q. And I ask you whether or not in 1940 you were able to agree with the union upon those matters?

A. No, we could reach no meeting of the minds.

Q. Now, in 1941, the testimony of Mr. Duke and Mr. Brown is that the chief discussions were on the questions of wages and apprentices, but that there was also mention made of some of the matters that you say were discussed in 1940. What is your recollection in regard to that?

A. I would say that the main emphasis was placed upon wages and apprentices.

Q. Do you recall whether or not there were discussions as to the other subjects in the 1941 negotiations?

A. I presume there was probably something said about it but the main discussion was on wages and apprentices.

Q. Prior to the 1941 negotiations, it has been testified by [438] Mr. Brown, I believe, that there was a suggestion that the company and the union arbitrate matters which had not been agreed upon between them. Such a suggestion was made, was it not? A. Yes, sir.

Q. And at that time what was your understanding that the union was desirous or was willing to arbitrate? A. They were willing to——

Mr. Ryan: I object. I want the statement of what was said in that regard.

(Testimony of C. H. Hoiles.)

Trial Examiner Moslow: I will sustain the objection.

Mr. Sargent: Well, I am trying to hurry through. I have no desire to hasten, however, so that you can't cross examine him at length.

Q. (By Mr. Sargent): I ask you whether or not the union was willing to arbitrate all the matters in dispute or only the question of wages?

Mr. Ryan: I object on the ground it is a leading question.

Trial Examiner Moslow: I would like to know from the witness what the union said, then I will determine——

Q. (By Mr. Sargent): What did the union say with respect to arbitration, prior to the 1941 negotiations?

A. They were very willing to arbitrate wages, but not particularly willing to arbitrate anything else.

Trial Examiner Moslow: Is that what they said?

[439]

The Witness: They wanted to arbitrate the wage question.

Trial Examiner Moslow: That is what they said?

The Witness: Yes.

Q. (By Mr. Sargent): And did they offer or agree at any time to arbitrate anything else but wages? A. No, sir.

Q. Now, the testimony is, both in the form of an exhibit and from oral testimony of Mr. Duke and Mr. Brown, that the company made an offer of $40

(Testimony of C. H. Hoiles.)

a week during the 1941 negotiations, to the printers, increasing weekly wages, and leaving the hourly wages the same. I ask you what you told the union negotiating committee at the time that proposal was made by you as to the purpose of it.

A. I told them that this would give the additional weekly and yearly income that they were desirous of. It would also give us a chance to put more news in the paper and maybe get part of the expense back in the form of additional subscribers.

Q. Did you at the time indicate whether or not that was the furthest extent to which the paper believed it could go?

A. I showed them the percentage, the composing room costs, as to 1929 and to 1939 or 1940. I showed them that was as high as we could go, because the costs in the later period were higher than they were in 1929.

Trial Examiner Moslow: In 1929? [440]

The Witness: Percentage costs.

Trial Examiner Moslow: The 1940 were higher than they were in 1929?

The Witness: The percentage costs of the composing room were higher than they were in 1929.

Q. (By Mr. Sargent): And you obtained the 1929 figures from the preceding owner?

A. I obtained them from the books.

Q. That is, you had the books——

A. It was the same corporation that we——

Q. Oh, yes. That was the same corporation. Is that right? A. Yes.

(Testimony of C. H. Hoiles.)

Q. You testified that in 1940 you didn't come to an agreement with the union. In 1941 did there at any time come an agreement between you and the union? A. No, sir.

Q. At the risk of being repetitious, during any period of the 1940 or 1941 negotiations, or at any time during 1941 or up to the date of the strike in 1941, was there ever a time when you and the union were in agreement upon the matters which were the subject of negotiations? A. No, sir.

Q. Did the union ever offer you during that period of time any other detailed contract?

A. There was no reason to, because there was nothing—we [441] couldn't agree upon the provisions, to sign.

Trial Examiner Moslow: You haven't answered the question.

Q. (By Mr. Sargent): My question is: Did they ever bring to you, and say: Here is a written contract which represents what we want?

A. No, sir, not in 1940 and 1941, no.

Q. As the officer in charge of labor relations for the company, did you attempt, during the 1940 and 1941 negotiations to reach an agreement with the union? A. Yes, sir.

Mr. Ryan: I object to that as calling for a conclusion.

Trial Examiner Moslow: I will sustain the objection.

Q. (By Mr. Sargent): I will ask another ques-

(Testimony of C. H. Hoiles.)

tion, and don't answer until Mr. Ryan has had a chance to object.

If you could have gotten together with the union upon terms deemed by you to be reasonable, would you have been glad to have reached an agreement with the union?

Mr. Ryan: I would object because it is a hypothetical question.

Trial Examiner Moslow: I will sustain the objection on the ground it is a self-serving declaration.

Mr. Sargent: You will remember we had a lot of testimony I thought equally objectionable from the union when opinions and self-serving declarations were made, and we want to have the evidence show both sides of the question. [442]

Trial Examiner Moslow: Go ahead.

Q. (By Mr. Sargent): Would you have preferred to have been able to reach an agreement with the union rather than to have had the strike?

Mr. Ryan: I object to the question.

Trial Examiner Moslow: Objection sustained.

Mr. Sargent: I take it there can be an assumption as to what answer might be made to these questions if they were permitted to be answered by the Examiner.

Q. (By Mr. Sargent): Did you intend at any time during the 1940 or 1941 negotiations to refuse to bargain collectively with the union?

Mr. Ryan: I object to the question.

(Testimony of C. H. Hoiles.)

Trial Examiner Moslow: I will sustain the objection.

Mr. Sargent: This is a question of intenton.

Trial Examiner Moslow: His intention is of no value if he violated the Act; the fact he had intended to do so wouldn't help him.

Mr. Sargent: Mr. Examiner, the intention, here we have got counsel putting in editorials to show what the intention was or wasn't.

Trial Examiner Moslow: I will sustain the objection.

Mr. Sargent: May the record show——

Trial Examiner Moslow: You can make an offer of proof, if you want to. [443]

Mr. Sargent: May the record show that I have offered proof, which, if permitted to be received, would have indicated that the company would much have preferred to have reached an agreement with the union. That it did not desire it strike. That it did not ever in its intention or by any act of it, fail to bargain collectively.

Trial Examiner Moslow: I am not ruling that this type of evidence referred to is immaterial. I am ruling that you can't prove it by these types of questions.

Mr. Sargent: And that the answer would have shown, that Mr. Hoiles' denials would have shown it did not fail to bargain in good faith with the union.

Q. (By Mr. Sargent) Now, Mr. Hoiles, did you

(Testimony of C. H. Hoiles.)

ever refuse to meet with the union representatives?

A. No, sir.

Q. Now, there has been testimony here by both Mr. Liles and Mr. Saleh, with respect to a conversation which each of them testified that they had with you shortly after the strike, when the question arose as to whether the stereotypers would be called out by their union. Do you recall having a conversation with Mr. Liles, and one with Mr. Saleh with respect to the question of stereotypers?

A. Yes, sir.

Q. Were there one or two conversations?

A. With Mr. Liles and Mr. Saleh there was one conversation. [444]

Q. Were they together, or separately?

A. Mr. Liles and Mr. Saleh were together.

Q. What was said at that time by you and by them as to this situation?

A. There was a discussion as to—Mr. Liles was presenting the fact that the stereotypers felt they could not go through a picket line, and he was explaining that this was not, they were not striking, but they were just not going through a picket line. He was trying to explain his position, that they would like to come back as soon as the situation was straightened out.

Q. Was there a remark made by you at the time with respect to the Typographical Union coming back into the plant?

A. There was a question, in questioning Mr.

(Testimony of C. H. Hoiles.)

Liles as to what he thought would happen to the stereotypers union if certain things would happen.

Q. Tell us the conversation. Tell us what your remark was, if you can recall.

A. They were discussing about picket lines and if the printers would come back, and Mr. Liles—I asked Mr. Liles: What if they never come back? And he says, "Well, if they" meaning, of course, the Typographical Union, he says, "Well, if the picket line was off, it would make no difference."

Q. I ask you whether in your conversation that you ever indicated in your remarks either to Mr. Liles or Mr. Saleh, [445] that you wouldn't permit the printers to come back?

Mr. Ryan: I object, unless he tells us just what was said.

Trial Examiner Moslow: I will overrule the objection.

The Witness: Certainly not.

Q. (By Mr. Sargent) Did you at the time you had this conversation with Mr. Liles and Mr. Saleh, have an opinion as to whether or not the Typographical Union employees would come back?

Trial Examiner Moslow: I don't know that this type of evidence is probative at all. His mental processes aren't revealed to anyone and are of no value.

Mr. Sargent: If he said "Yes," I want to say "Upon what did you base that," in order to indicate what had been said, in turn, by the union.

Trial Examiner Moslow: I don't see that these

(Testimony of C. H. Hoiles.)

processes, or the operation of his mind, are evidentiary. If they are, they are of so little weight that they are not worth the waste of time.

Mr. Sargent: There is what I believe to be a misleading statement left on the record now, and I am asking to find out from this witness what actually he meant by the statement when it was made, or if it was made.

Trial Examiner Moslow: He has just denied making the statement attributed to him by Messrs. Liles and Saleh. [446]

Mr. Sargent: Yes, but he had said he said: What if they never come back. He has denied, that is true, saying we would ever keep them from coming back, or words which would have that connotation. I am asking why the question arose in his mind as to whether they ever would come back.

Trial Examiner Moslow: I will let you answer that.

Q. (By Mr. Sargent) Was there a doubt in your mind as to whether the Typographical Union would come back?

A. Certainly they left; I didn't know.

Q. What caused you to have that doubt?

A. We seemed to be unable to get together, and if they were going to hold to that——

Q. Had the union leaders made any remarks to you at the time of the strike as to why they went out on strike? A. Mr. Duke did.

Q. What did he say?

A. He said he was sorry to advise me that after

(Testimony of C. H. Hoiles.)

7:00 o'clock the next morning that the printers would not work at that wage scale.

Q. And I ask you whether the remark of Mr. Duke was being taken into consideration by you when you expressed the doubt to Mr. Liles and Mr. Saleh as to whether the Typographical Union printers would come back?

Mr. Ryan: I object to the question. He didn't communicate that to anyone. [447]

Trial Examiner Moslow: I will let him answer. Did you have that in your mind at the time?

The Witness: I had the whole negotiations in my mind.

Trial Examiner Moslow: Very well.

Q. (By Mr. Sargent) When the letter——

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Q. (By Mr. Sargent) When the letter of April 26th, Board's Exhibit 5 in evidence was sent by you to Seth R. Brown, making the offer of $40 a week instead of $37.50 and mentioning the words "complete control of number and work of our apprentices", what did you mean by the words "complete control of the number and work of our apprentices"?

Mr. Ryan: I object.

Trial Examiner Moslow: I will sustain the objection.

Q. (By Mr. Sargent) During the negotiations in 1941, what were the main subjects in dispute be-

(Testimony of C. H. Hoiles.)

tween the union and yourself pertaining to apprentices?

A. As to whether they could work on the machine or not.

Q. And was there anything else which was in dispute between you and the union on the question of apprentices?

A. As to what the ratio should be between the number of journeymen and the number of apprentices.

Q. And you were asking for a greater number than they [448] permitted under the oral contract. Is that right? A. Yes.

Trial Examiner Moslow: How many were you asking for?

The Witness: I was asking for four or five.

Q. (By Mr. Sargent) And you were permitted how many under the oral contract?

A. The oral contract was three.

Q. Three. Did you have considerable discussion with Mr. Brown and Mr. Duke and any of the other union people over the question as to how soon, or during what portion of their apprenticeship, apprentices could work on the linotype machine?

A. I don't quite get that question.

Mr. Sargent: Read the question.

(The question was read.)

The Witness: There was a discussion as to how soon, yes. Mr. Brown and Mr. Patison had a difference of opinion as to when they should go on the machine.

(Testimony of C. H. Hoiles.)

Q. (By Mr. Sargent) What did they say and what did you say?

A. Mr. Patison was under the impression they could go on the machines earlier than Mr. Brown thought.

Q. Did he say how early?

A. No, he didn't specify.

Q. He didn't specify what year?

A. No. [449]

Q. But he said it could be done earlier than the sixth year. Is that right?

A. Yes. Yes. Mr. Brown stated that the sixth year was when the apprentices should be on the machines. Mr. Patison, he thought it was before that.

Q. What did you say in that discussion?

A. In that particular discussion I just listened to them discuss it.

Q. Well, at other discussions in April, 1941 what did you say with respect to the company's position as to when the apprentices should be permitted to go to work on the machines? A. We felt——

Q. What did you say? You can't say what you felt.

A. We stated that inasmuch as the machines were the greatest amount of—the machine part was the greatest percentage of the operation of the composing room, that if anybody was going to work on a machine, after he got to his—if he was going to spend his life work on a machine, that he was wasting a lot of time on other stuff, and it would

(Testimony of C. H. Hoiles.)

give us a greater flexibility if he would go on the machine and learn it as fast as he could.

Q. And the union, did it agree, at any time, to the apprentices being put on the machine prior to the sixth year? A. No, sir.

Q. What? [450] A. No, sir.

Q. It has been testified in the evidence that you made a remark, I believe to Mr. Brown, upon one occasion after you had made your offer of wages, that you would be glad to discuss the situation further with the union representatives, but that you might have to talk about the war or the weather. Was that remark made by you? A. Yes, sir.

Q. All right. Tell what took place prior to the remark.

A. Well, we had discussed everything, pro and con.

Q. And what led up to the remark?

A. Oh, suggestions for another meeting. I was always willing to meet with them if we had to discuss the situation, but we discussed everything pro and con and we seemed to be no—making no satisfactory progress, and I advised them I was willing to meet and discuss with them again, but we might as well talk about the war and the weather, if we weren't going to make any more progress than we had been.

Q. In other words, had the negotiations for that period reached such a stage that both the union and the paper would have had to withdraw from their

(Testimony of C. H. Hoiles.)

positions or an agreement could not be reached? Is that right?

Mr. Ryan: I object.

Trial Examiner Moslow: Objection sustained.

Q. (By Mr. Sargent) What gave rise to your remark other [451] than as you have indicated? What caused you to believe that while you were willing to meet with the union, unless there was some change, further negotiations would be fruitless?

Mr. Ryan: I object.

Trial Examiner Moslow: I will sustain the objection.

Q. (By Mr. Sargent) At the time you made the remark had the negotiations reached an impasse?

Mr. Ryan: I object.

Trial Examiner Moslow: Sustained. That is one of the ultimate issues in this case. You can't dispose of it as easily as that, sir.

Mr. Sargent: I know, but I am very clear in a lot of remarks made on behalf of the union, that they were struggling hard to get together, and so forth, and I would like to get the opinion of the management, which I think it is entitled to make, as much as the union was entitled to, by its assertions in the record.

Trial Examiner Moslow: What evidentiary value is his opinion that matters have reached an impasse.

Q. (By Mr. Sargent) What was the status, Mr.

(Testimony of C. H. Hoiles.)

Hoiles, of the negotiations at the time you made that remark?

Mr. Ryan: I object to that as calling for a conclusion.

Trial Examiner Moslow: I will sustain the objection.

Mr. Sargent: Mr. Examiner, it does make a great deal [452] of difference whether that was an idle remark or whether the negotiations had reached such a stage that unless there was a surrendering of the position of either party, they couldn't get together.

Trial Examiner Moslow: I think you ought to show what the negotiations were. That is the only way it can be done.

Q. (By Mr. Sargent) At the time the remark was made, what had, if you can recall, last been said by either party with respect to the subjects that were under negotiation at the time?

A. Said?

Q. Yes. What had led up to the remark? What had taken place before?

A. Well, the union had re-presented their demands and we had re-presented our counter-proposals.

Q. And they had turned down your counter-proposal and you had turned down their proposals? Is that right? A. That is right.

Q. And each of you had argued strenuously for your position. Is that right? A. Strenuously.

Mr. Ryan: I object to that as immaterial.

(Testimony of C. H. Hoiles.)

Trial Examiner Moslow: Let the answer stand.

Q. (By Mr. Sargent) At the close of the arguments was it apparent that you were any nearer agreement? [453]

Mr. Ryan: I object.

Trial Examiner Moslow: Sustained.

Mr. Sargent: I only have one more question before this motion to ask him, and that is somewhat tied up with the question of the details of the contract we are going to dig out over the lunch hour. So, I suggest we let that go until we have the other to ask him at the same time.

Trial Examiner Moslow: All right.

Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record. We will recess at this time until 2:30.

(Whereupon at 1:15 o'clock p. m. a recess was taken until 2:30 o'clock p. m. of the same day.) [454]

Afternoon Session

(The hearing was reconvened at 2:30 o'clock p. m.)

Trial Examiner Moslow: The hearing will come to order. Mr. Hoiles.

C. H. HOILES,

called as a witness by and on behalf of the respondent, having been previously duly sworn, was examined and testified as follows:

Mr. Sargent: Mr. Examiner, at your request I have endeavored over the lunch hour to find out as best I could what was the verbal agreement under which respondent was operating in the years 1937 until the day of the strike, and I have obtained from Mr. William Lawrence, the foreman, a printed but unsigned copy of a paper entitled: "Contract Scale of Wages", etc. "Santa Ana Typographical Union, No. 579", and I have been informed by Mr. Lawrence who was then and is now the foreman in respondent's composing room, that this is the contract which he had in his desk, the original document, and that with one or two exceptions known to me, he followed this in his operations in the composing room.

The exceptions that he tells me, are, one: that the question of holidays, Armistice Day, which is called for here, was taken out and Memorial Day was inserted; and that also there was originally a differential between the commercial print shops and newspaper contracts which he believes was [455] dissipated, referring to the differential, in 1939; and I also understand that at some time there was a change in the starting time from 6:30 a. m. as contained in this working document, to 6:00 o'clock, I believe. So, instead of the hours from 6:30 a. m. to 6:00 p. m., I believe they were 6:00 a. m. to 6:00 p. m.

(Testimony of C. H. Hoiles.)

Direct Examination

By Mr. Sargent:

Q. Mr. Hoiles, is that your recollection?

A. I think 7:00 a.m. to 6:00 p.m.

Q. 7:00 a.m. to 6:00 p.m.?

Trial Examiner Moslow: Apart from those relatively minor clauses, are you in agreement with the other clauses?

Mr. Ryan: I would like to see it first.

I have been advised that the contract is the same as the one that was in effect between the company and the union.

Trial Examiner Moslow: All right. Shall we introduce it as a Board's exhibit or as a respondent's exhibit? Or as a Trial Examiner's exhibit?

Mr. Sargent: Well, for the stipulation, between the union and ourselves, so far as can be observed, this was the contract under which the Register was operating during those years.

Mr. Ryan: So far as can be observed, yes.

Mr. Sargent: So far as we can observe, that is the case. I don't care to introduce it, Mr. Examiner. [456]

Trial Examiner Moslow: Let us receive it as Board's Exhibit 14. It will be so marked and received.

(Thereupon the document referred to was marked as Board's Exhibit No. 14, and was received in evidence.)

(Testimony of C. H. Hoiles.)

BOARD'S EXHIBIT No. 14

Contract
Scale of Wages, Etc.
Santa Ana Typographical
Union Number 579

Witnesseth

That on and after the first day of March, 1937, until the first day of March, 1939, inclusive, and thereafter as herein provided, the party of the First Part, .....

.....

and the party of the second part, (Santa Ana Typographical Union No. 579), hereby mutually agree that they will respect and observe all the terms and conditions of this agreement.

Provided, Further, That this agreement shall remain in effect for a reasonable time (not to exceed sixty days) after the date of its expirations as may be necessary for the negotiations of a new wage scale and agreement.

First, the party of the first part agrees to employ in its composing rooms and departments thereof none but members and apprentices of Santa Ana Typographical Union No. 579; provided that said Santa Ana Typographical Union No. 579, party of the second part, shall furnish sufficient competent help to enable the party of the first part to issue its publications or other printed matter in a prompt and regular manner.

(Testimony of C. H. Hoiles.)

Second, Santa Ana Typographical Union No. 579, party of the second part, agrees to exert its best efforts to furnish such employes.

Third, It is hereby mutually agreed that two departments, namely, "Floor" and "Machine," shall be recognized in the composing room of the party of the first part. Under the "Machine" Department shall be classified all members of Santa Ana Typographical Union seeking employment in the composing room of the party of the first part as operators, machinist-operators, or machinists of type-setting machines, type-making machines or material-making machines.

Under the "Floor" Department shall be classified all members of Santa Ana Typographical Union seeking employment in the composing room of the party of the first part as hand compositors, make-ups, bank men, battery men or Ludlow operators.

It is further agreed that separate priority lists shall be maintained in the departments named above, and recognized by both parties to this contract.

Scale of Wages

Section 1—

(a) The scale of wages for journeymen employed on a day shift shall not be less than ninety-two cents (92c) per hour beginning March 1st, 1937, for a period of five (5) months; then ninety-five cents (95c) an hour beginning August 1, 1937, for a period of six (6) months; then one dollar

(Testimony of C. H. Hoiles.)

($1.00) per hour beginning February 1, 1938, for a period of thirteen (13) months, ending March 1, 1939.

(b) Journeymen employed on a night shift shall receive not less than the scale for day work, plus the sum of Fifty (50) cents for each shift worked.

(c) Any employe filling a position temporarily for another employe shall receive the same scale of wages as set forth for the employe whose work he is performing.

(d) When an employe is required to work part of the regular day shift and part of the regular night shift, said employe shall receive night scale of wages. Any employe required to work on any shift starting later than 12 midnight, shall receive not less than 50c per shift over night scale.

(e) All overtime shall be paid for at the rate of price and one-half based on the hourly wage paid.

(f) Overtime work shall be understood to mean all work performed in excess of a regular shift.

(g) In offices operating 3 or not more than 10 machines where no regular machinist is employed, there shall be at least one machinist-operator, who shall be paid not less than Fifty Cents (50c) over the minimum journeyman wage per machine, per week. Machinist-operator shall be construed to mean an operator who shall be capable of keeping typesetting machines in running order and shall be responsile for the working of each machine. In offices

(Testimony of C. H. Hoiles.)

of more than 10 machines there shall be a machinist whose duty it shall be to care for such machines. He shall be paid not less than the minimum wage scale for journeymen.

(h) When a journeyman shall perform for the shift the duties as foreman, assistant foreman, machinist, machinist-operator or any other employe receiving the journeyman's scale, said employe shall receive the same scale of pay as the person whose duties he is called upon to perform.

Section 2—Working Hours:

(a) Beginning on March 1, 1937, and ending on March 1, 1939, both inclusive, a maximum of 5 days of 7½ hours, exclusive of lunch period of one-half hour, shall constitute a regular week's work in composing rooms or departments thereof. Provided that should the Party of the First Part desire to operate his composing room on the basis of 8 hours per shift he may do so by giving to the President of Santa Ana Typographical Union No. 579 notice in writing at least two weeks prior to the time he desires to make such change; provided further, that in the event the privilege of making such change is exercised, no further change in the hours constituting a regular shift be made by the Party of the First Part without consent of Santa Ana Typographical Union. Five hours shall constitute a day's or night's work on Fourth of July, Labor Day, Armistice Day, Thanksgiving, Christmas and New Year's. The short shift shall be worked on the legal holiday or the day observed as such; however the short shift

(Testimony of C. H. Hoiles.)

for the night side shall be worked the night before or night of holiday. It is optional with the Party of the First Part whether work shall be performed on the above-mentioned holidays.

(b) Regular working hours and lunch periods shall be fixed by the party of the first part (or the foreman), as follows:

(c) Regular hours for day work in all composing rooms shall be fixed between 6:30 a.m. and 6 p.m.

(d) Regular hours for night work in all composing rooms shall be fixed between 6 p.m. and 6:30 a.m.

(e) No employee shall receive less than a day's pay except when discharged for cause or when excused at his own request.

Commercial Offices:

(a) A regular week's work in commercial offices shall consist of 5 days of 7 hours and 4 hours on Saturday morning.

(b) In commercial offices no employe shall be paid for less than one-half day except when discharged for cause or when excused at his own request.

Section 3—Trade Apprentices:

(a) The Santa Ana Typographical Union shall have jurisdiction over all apprentices employed by the Party of the First Part, and such apprentices shall be properly schooled in the printing trade, as provided in the by-laws and regulations of the International Typographical Union.

(Testimony of C. H. Hoiles.)

(b) The number of apprentices employed by the party of the First Part shall not exceed the ratio of 1 to every four (4) journeymen members (or fraction thereof) regularly employed in the composing room; provided no office shall be entitled to more than three (3) apprentices.

(c) No apprentice shall be employed on overtime work unless the regular ratio of employes on the same shift is engaged in work.

(d) At no time shall an apprentice have charge of a department; nor shall an apprentice substitute for a journeyman employe.

(e) Apprentices in their second year shall be paid not less than 40 per cent of the minimum wage paid to journeymen; third year, 50 per cent; fourth year, 60 per cent; fifth and sixth years, or until in possession of a journeyman's card, 80 per cent of the journeyman wage.

(f) During their last year of apprenticeship, apprentices must be given opportunity to learn to operate any and all typesetting and typecasting devices in use in the offices where they are employed.

(g) Apprentices must work on the same schedule of hours as provided in paragraph (a), Sec. 2 of this agreement for journeymen, and nothing in this schedule shall be construed as preventing an apprentice from receiving more than is provided therein.

(h) Beginning with the third year, apprentices shall be enrolled in and complete the I.T.U. Course

(Testimony of C. H. Hoiles.)

of Lessons in Printing before being admitted as journeymen members of the Union.

Section 6—Other Provisions:

(a) All points not covered herein shall be governed by the constitution and by-laws of Santa Ana Typographical Union No. 579 and the general laws of the International Typographical Union dated January 1, 1937, all of which are hereby made a part of this agreement.

(b) Santa Ana Typographical Union at all times has the right to define as struck work composition executed wholly or in part by non-members, and composition or other work coming from or destined for printing concerns which have been declared by the union to be unfair, after which union members may refuse to handle the work classified as struck work. It is understood and agreed that this section does not apply to national advertising or syndicated matter.

(c) Matrices, plates, cuts or type of advertisements or other matter previously used which has been produced within the jurisdiction of Santa Ana Typographical Union No. 579, may be used, provided such matter shall be reproduced as nearly like the original as possible within 30 days from time of publication. It is understood that this rule does not apply to national advertising nor to matter received from outside the jurisdiction of Santa Ana Typographical Union, nor to printed supplements, magazines, syndicate or other feature matter, in matrices, cuts or plates in page size or smaller.

(Testimony of C. H. Hoiles.)

(d) It is agreed that if any concession is granted by the party of the Second Part to any employer, the party of the First Part, at his option, shall be granted the same concession.

The office is entitled to all "pick-ups" of any character whatsoever. Matter once paid for shall always be the property of the office. "Kill" marks shall not deprive the office of "pickup."

This section shall not be construed as prohibiting the loaning, borrowing, exchanging, purchase or sale of matter in matrices, cuts, or plates or type occasioned by extraordinary emergencies, such as fire, flood, explosion, or other unforeseen disaster, including the "pi" of a form or forms, when it will be permitted without penalty.

The addition of names and addresses of local selling agents to any advertisement not falling within those definitions does not make the advertisement a local advertisement.

The inability of the local union to furnish men to produce such matter or matrices during the regular hours and within the agreed time limit shall not eliminate such matter from reproduction, which shall be made as soon as the local union can furnish help to do the work.

In Witness Whereof, the said parties have hereunto set their hands and seals the day and year herein written.

By .....

.....

.....

(Testimony of C. H. Hoiles.)

By .....

.....

.....

By .....

.....

.....

Dated.....

By .....

President.

By .....

Secretary.

This Contract is entered into by and with the consent of the International Typographical Union, an organization to which the party of the first part concedes jurisdiction and control over the trade organizations in typographical departments of the party of the first part, covered by this contract and scale of prices and the International Typographical Union, through its authorized officers, hereby agrees to protect the party of the first part in case of violation of the agreement by the said party of the second part, under the jurisdiction of said International Typographical Union.

By .....

.....

President International Typographical Union.

.....

Witness as to President.

N. B.—This Contract Must Be Executed in Triplicate. (Union Label 3)

(Testimony of C. H. Hoiles.)

Q. (By Mr. Sargent): Now, Mr. Hoiles, are you a member of a partnership which operates a newspaper in Clovis, New Mexico? A. Yes.

Q. What is the name of that paper?

A. Clovis News-Journal.

Q. Is that paper under contract with a local of the International Typographical Union?

A. Yes.

Q. Do you happen to know when the contract between that paper and the local was executed?

A. It was executed in January of 1942.

Q. And I ask you whether that was a renewal of a previous contract?

A. It was a renewal of a contract that was executed in, I think, November, 1940.

Q. And running for how long, do you know?

A. For one year.

Q. Was that a signed agreement?

A. Yes, sir.

Q. I ask you whether, at my request, you sent down to New Mexico to get that contract? [457]

A. Yes, sir.

Q. Am I correct in understanding that the contract ran from November 30, 1930 to November 30, 1941 and has been renewed? Is that right?

A. November 30, 1940 to November 30, 1941?

Q. Yes. A. Yes.

Q. And has since been renewed?

A. Yes.

Q. Do you know the approximate date at which the renewal was made? A. January, '42.

(Testimony of C. H. Hoiles.)

Q. And I ask you whether or not the local of the Typographical Union is Local No. 985?

A. Yes.

Q. Did you receive back a copy of the old contract expiring on November 30, 1941, and such additions as were agreed to, January 10, 1942?

A. Yes, sir.

Q. I ask you whether or not you know some of the clauses pertaining to apprenticeship in that contract of January 10, 1942?

Mr. Ryan: He has the contract. Why not introduce that in evidence?

Trial Examiner Moslow: Do you hear that?

[458]

Mr. Sargent: I am sorry.

Trial Examiner Moslow: Read Mr. Ryan's statement.

(The record was read.)

Mr. Sargent: So far as I know this is the original contract and I have no objection to its being looked at and examined, but I hate to have the original put in evidence, as it is the only one we have.

Trial Examiner Moslow: You may substitute a typewritten or photostatic copy.

Mr. Ryan: I will object to the introduction of that contract as immaterial and irrelevant for this reason: That the company operating the Clovis Journal is a partnership, a partnership including individuals that are not in any way connected with the Register Publishing Company, Ltd., and the

(Testimony of C. H. Hoiles.)

people signing the contract referred to by respondent's counsel on behalf of the company in Clovis, New Mexico, are not the same persons that are the owners of the Register Publishing Company, Ltd. It appears so on the face of the contract.

Trial Examiner Moslow: May I see the contract?

Mr. Sargent: I may say, Mr. Examiner, that I am not trying to establish ownership, but simply what another typographical union has provided in respect to apprentices under the jurisdiction of Mr. Brown, as the International Representative of the I.T.U. [459]

Trial Examiner Moslow: What is your point, Mr. Sargent?

Mr. Sargent: You haven't got to it. Turn to another page and you will see.

My purpose, Mr. Examiner, is not to establish the terms of this other contract, but on the question of credibility of the Board's witnesses, in the first place; and, second, on the question of unreasonableness or reasonableness on the part of the local and of the respondent to indicate that variations in the apprenticeship clauses were, no later than January 10th of this year, agreed upon by another I.T.U. contract also under the jurisdiction of Mr. Brown, as testified to by him last week.

Trial Examiner Moslow: These modifications are in this sheet, January 10, 1942? (Indicating.)

Mr. Sargent: That is right.

(Testimony of C. H. Hoiles.)

Trial Examiner Moslow: These are the so-called verbal modifications?

Mr. Sargent: I assume so. There is a sworn statement by Mary Robbins, the auditor of the partnership, which states exactly what those modification are.

Trial Examiner Moslow: Your point is, the Typographical Union has, therefore, signed a contract bearing alterations in the apprenticeship clauses?

Mr. Sargent: That is right.

Trial Examiner Moslow: What is the proof that the [460] International Union has approved these verbal modifications?

Mr. Sargent: You have testimony here by Mr. Brown that they wouldn't approve any modifications from the constitution and by-laws, and here is one that is directly contrary to what he said, because one of the modifications is that the management may teach the apprentices to operate the machines as soon as it is to their best advantage to do so.

Trial Examiner Moslow: What proof is that that the International office has approved these verbal modifications?

Mr. Sargent: That is something the union undertakes, not the management; it is the local's function to obtain the consent of the International, not the employer's.

Q. (By Trial Examiner Moslow): Mr. Hoiles, how much interest do you have in this Clovis News-Journal? A. Do I have?

(Testimony of C. H. Hoiles.)

Q. Yes. A. Forty-five per cent.

Q. Is that a personal interest, or an interest of the Register Publishing Company?

A. Personal.

Q. And your father has no interest?

A. Yes.

Q. He is interested? A. Yes. [461]

Q. How much of an interest does he have?

A . Forty-five per cent.

Q. Together you have 90 per cent?

A. Yes.

Trial Examiner Moslow: I will overrule the objection and receive the contract in evidence. Have it marked as Respondent's Exhibit 2 in evidence.

(Thereupon the document referred to was marked as Respondent's Exhibit No. 2, and was received in evidence.)

RESPONDENT'S EXHIBIT No. 2

Full Leased Wire
Associated Press

Arthur H. Hagg & Assoc. Inc.
Publishers Representative

Clovis News-Journal
"New Mexico's Greatest Newspaper"
Clovis, New Mexico

May 7, 1942.

Richard Hindley
Publisher

Mr. R. C. Hoiles
Santa Ana Register
Santa Ana, Calif.

Dear Mr. Hoiles:

Attached is the printers contract now in effect between Union 985 and the Clovis News-Journal, according to the best of my knowledge. I have had this notarized and have attached the agreement made in January of this year to the old agreement.

As you probably know, Mrs. Hindley lost her sister and about a week later her father passed away. Mr. Hindley has been in Ohio for the past five days and will not return until Monday. If this is not all the material which you will require, he will forward it to you upon his return Monday.

Sincerely
/s/ MARY K. ROBBINS.

Mary K. Robbins
m

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

AGREEMENT

Between

Clovis News-Journal

Clovis, N. M.

and

Clovis

Typographical Union

No. 985

Effective November 30, 1940.

Expires November 30, 1941.

CONTRACT

This Agreement, Made and entered into this 30th day of November, 1940, by and between the Clovis News-Journal Company, through its authorized representatives, the party of the first part, and the subordinate union of the International Typographical Union of the city of Clovis, N. M., known as Typographical Union No. 985, by a committee duly authorized to act in its behalf, party of the second part.

Witnesseth, That from and after November 30, 1940 and for a term of one years, ending November 30, 1941 and for such reasonable time thereafter (not exceeding thirty days) as may be required for the negotiation of a new agreement, the establishment represented by the said party of the first part binds itself to the employment in its composing room, and the departments thereof, of mechanics

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

and workmen who are members of Typographical Union No. 985 and agrees to respect and observe the conditions imposed by the constitution, by-laws, and scale of prices of the aforesaid organization and the laws of the International Typographical Union, copies of which are hereunto attached and made a part of this agreement.

And it is further agreed that aforesaid constitution and by-laws may be amended by said party of the second part without the consent of the party of the first part: Provided, however, That changes which conflict with the terms of this contract or affect wages, hours or working conditions shall not become operative during the life of this instrument except by mutual consent of both parties signatory thereto.

It is further agreed that the scale of prices appended hereto shall continue in operation without change during the life of this contract, except such changes as may be mutually agreed upon between the parties hereto.

A standing committee of two representatives of the party of the first part, and a like committee of two representing the party of the second part, shall be appointed; the committee representing the party of the second part shall be selected by the union; and in case of a vacancy, absence or refusal of either of such representatives to act, another shall be appointed in his place. To this committee shall be referred all disputes which may arise as to the

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

scale of prices hereto attached, the construction to be placed upon any clause of the agreement, or alleged violations thereof, which can not be settled otherwise, and such joint committee shall meet when any question of difference shall have been referred to it for decision by the executive officers of either party to this agreement. Should the joint committee be unable to agree, then it shall refer the matter to a board of arbitration, the representatives of each party to this agreement to select two arbiters, and the four to agree upon a fifth. The decision of this board shall be final and binding upon both parties. Provided, That local union laws not affecting wages, hours or working conditions and the general laws of the International Typographical Union shall not be subject to arbitration.

In Witness Whereof, We have hereunto set our hands and seals this 30th day of November, 1940.

CLOVIS NEW-JOURNAL.

(Signed) EARLE C. BOSWELL,
President.

(Signed) J. W. SIMPSON,
[Seal] Sec.Treas.

(Signed) R. HINDLEY,
Publisher.

This contract is entered into by and with the consent of the International Typographical Union, an organization to which the party of the first part concedes jurisdiction and control over trade organi-

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

zations in all mechanical departments of the party of the first part, with the exception of the stereotyping room, pressroom and bindery, and the International Typographical Union, through its authorized representatives, hereby agrees to protect the party of the first part in case of violation of the agreement by the said party of the second part under the jurisdiction of said International Union.

In Witness Whereof, I have hereunto set my hand and seal this .....day of March 24, 1941.

(Signed) C. M. BAKER,
President International Typographical Union.

Daily Newspaper Scale

Section 12. Eight hours shall constitute a day's work. Five days shall constitute a week's work.

Section 13. Eight hours shall constitute a night's work. Five nights shall constitute a week's work.

Section 14. Day work shall be between 7:00 A. M. and 6:00 P. M.

Section 15. Night work shall be between 6:00 P. M. and 7:00 A. M.

Section 16. When it is necessary to work split shifts, running from day into night hours, or vice versa, said shift shall consist of eight hours and no minutes and shall be paid for at night rates.

Section 17. Foremen shall receive not less than $38.00 per week for day work and not less than $40.00 per week for night work.

Section 18. Unless otherwise specified in this

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

scale all journeymen shall receive not less than $34.00 per week for day work and not less than $36.00 per week for night work.

Section 19. Machine operators shall receive not less than $34.00 per week for day work and not less than $36.00 per week for night work.

Section 20. Machinist-operators shall receive not less than $36.00 per week for day work and not less than $38.00 per week for night work based on operating and caring for one machine. For each additional machine cared for machinist-operators shall receive $XX per week. All time in excess of regular hours to be paid for at price and one-half based on the hourly wage paid.

Section 21. A machinist shall be employed where XX or more machines are in operation. Machinists shall receive not less than $XX per week for day work and not less than $XX per week for night work.

Section 22. The minimum scale for apprentices shall be in proportion to the journeyman's scale for day or night work as follows:

| | First Six Months. | Second Six Months. |
|---|---|---|
| First year at option of management. | | |
| Second year | 35% | % |
| Second year | 35% | % |
| Third year | 45% | % |
| Fourth year | 60% | % |
| Fifth year | 75% | % |
| Sixth year | 90% | % |

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

Apprentices

Section 23. Apprentices may be employed in the ratio of one to every five journeyman members of the typographical union regularly employed until XX apprentices have been employed, then the ratio shall be one to every XX journeymen. No office will be permitted more than two apprentices. Provided that no office shall be entitled to an apprentice unless at least two journeymen, aside from the proprietor, shall be regularly employed in the composing room.

Section 24. The foreman of the office and the local apprentice committee shall examine applicants and determine if they are mentally and physically fitted to the trade. The examination must prove that applicants for apprenticeship possess the rudiments of a common school education.

Section 25. Apprentices shall be not less than sixteen years of age at the time of beginning their apprenticeship. They shall be registered by the secretary of the local typographical union and they shall serve an apprenticeship period of six years before being admitted to journeymen membership in the union.

Section 26. At the end of the first year, if apprentices prove competent, they must be admitted as apprentice members of the union, at which time they will be registered with the Secretary-Treasurer

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

of the International Typographical Union, who will assign to each junior member a registry number.

Section 27. Starting with the second year, apprentices are entitled to and must be in possession of an apprentice working card, endorsed by the secretary of the local typographical union.

Section 28. The foreman and chairman shall see that apprentices are afforded every opportunity to learn the different trade processes by allowing them to work in all departments of the composing room. When apprentices show proficiency in one branch, they must be advanced to other classes of work.

Section 29. Should an apprentice be careless and neglectful of the duties required by those in control of his trade training, his case shall be investigated by the local committee on apprentices and presented to the union for action.

Section 30. Registered apprentices shall be given the same protection as journeymen and shall be governed by the same shop rules, working conditions and hours of labor.

Section 31. Beginning with the second year, apprentices shall be enrolled in and complete the I.T.U. course of lessons in printing before being admitted as journeymen members of the union. They shall pay to the Secretary-Treasurer of Clovis Union No. 985 the sum of $.50 per week until the full tuition of the course is paid.

Section 32. Arrangements should be made to have apprentices in the final year instructed on

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

any and all typesetting and typecasting devices in use in the office where they are employed.

Section 33. Apprentices shall undergo periodic examinations before the local committee on apprentices. Their work must show if they are entitled to the increased wage scale provided in this contract. The employer or his representative has the right to be present and take part in any and all examinations.

Section 34. No apprentice shall be employed on overtime work unless the number of journeymen employed on the same shift equals the ratio prescribed in Section 23. At no time shall any apprentice have charge of a department or class of work.

Section 35. Chairmen of offices where registered apprentices are employed are required to make quarterly reports to the local committee on apprentices. These reports must show if the agreed conditions are being fulfilled by all parties to this contract—whether apprentices are being held back or if they are advanced in the different processes of the trade, and where apprentices are negligent or incapable of becoming competent workmen it must be set forth in the report.

Section 36. The local union reserves the right to refuse to register apprentices in any office which has not the necessary equipment to afford instruction being given in the different branches of work agreed upon.

Section 37. No apprentice shall leave one office

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

and enter the services of another employer without the written consent of the president of the union.

Section 23A. Provided that when there are eight or more journeymen on the board it shall be permissible to hire another apprentice if present apprentice has completed his third year of apprenticeship.

Miscellaneous

Section 38. All time worked before or in excess of the regular hours established for the day's or night's work shall be paid for at the overtime rate, which shall be price and one-half on the hourly wage paid.

Section 39. A lunch period of at least thirty minutes and not more than one hour shall be allowed for each shift, such time not to be included in the number of hours specified for a day's or night's work.

Section 40. Holidays. All work performed by day or night shifts beginning on Sundays or holidays shall be paid for at (price and one-half) (double price). The recognized holidays are: Fourth of July, Labor Day, Thanksgiving and Christmas, or days celebrated as such. This section shall not be construed as applying to regular night shifts on daily newspapers beginning on or extending into the morning of Sunday or a holiday.

Section 41. In no case shall an employe in daily

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

newspaper offices receive less than one day's pay except when discharged for cause or where excused at his own request.

Sction 42. Learners on machines shall be members of the union or apprentices in the final year of their apprenticeship. The following rates shall govern learners: Scale for learners shall be at mutual consent of office and local union.

First month .....per week..... .....
Second month .....per week..... .....
Third month .....per week..... .....
Fourth Month .....per week..... .....
Fifth month .....per week..... .....
Sixth month .....per week..... .....

Section 43. The term of learning shall cover a period of twenty-six weeks time it is permissible with the consent of the union to extend the period one month at the rate of $XX per day for any reasonable length of time.

Section 44. Employes called back after having left the office shall be paid $XX for such callback and overtime rates for all time worked.

Section 45. The interchanging, exchanging, borrowing, lending or buying of matter previously used, either in the form of type or matrices, between newspapers, between job offices, or between newspapers and job offices, or vice versa, not owned by the same individual, firm or corporation, and published in the same establishment, is unlawful, and

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

shall not be allowed unless such type or matrices are reset as nearly like the original as possible, made up, read and corrected and a proof submitted to the chairman of the office. Transfer of matter between a newspaper office and a job office, or a job office and a newspaper office, where conducted as separate institutions and from separate composing rooms, owned by the same individual, firm or corporation, is not permissible unless such matter is reset as nearly like the original as possible, made up, read and corrected and a proof submitted to the chairman of the office. Provided, That where an interchange of matter from an English publication to a foreign language publication, or vice versa, is desired, under the provisions of this section, such exchange shall be regulated by agreement between the employer and the local unions interested. The time limit with which borrowed or purchased matter, or matrices, are to be reset shall be 30 days from date of use.

Section 46. The foreman may discharge (1) for incompetency; (2) for neglect of duty; (3) for violation of office rules, which shall be conspicuously posted, and which shall in no way abridge the civil rights of employees, or their rights under accepted International Typographical Union laws.

Section 47. When it becomes necessary to decrease the force, such decrease to be accomplished by discharging first the person or persons last employed either as regular employes or as extra em-

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

ployes, as the exigencies of the matter may require. Should there be an increase in the force the persons displaced through such cases shall be reinstated in reverse order in which they were discharged before other help may be employed. Upon demand, the foreman shall give the reason for discharge in writing. Persons considered capable as substitutes by foreman shall be deemed competent to fill regular situations, and the substitute oldest in continuous service shall have prior right in the filling of the first vacancy. This section shall apply to incoming as well as outgoing foremen. Demand for written reason for discharge shall be made within seventy-two hours after member is informed of discharge.

Section 48. Any member who has been discharged and believes the discharge unjustified shall have the right to appeal to the chapel. Either party may appeal from the decision of the chapel to the local union.

(a) From the decision of the local union appeal may be made by either party to the Executive Council of the International Union and a convention as provided by I.T.U. law.

(b) ~~From the decision of the local union appeal may be made by either party to the local joint standing committee, the decision of which shall be final and binding.~~

Section 49. A superannuated member may be permitted to work at a rate of not less than 75%

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

of the regular scale of wages provided for journeymen; provided, that not more than one superannuated member shall be employed in any office at any one time, and no superannuated member will be allowed to work in any office where there are no journeymen employed.

Section 50. The union reserves to its members the right to refuse to execute all work received from or destined for struck offices, unfair employers or publications.

Section 51. No employe covered by this scale shall be required or permitted to hold a situation of more than five days or five nights or a combination of days and nights equivalent to five in one financial week. When any employe is required to work the seventh shift in any financial week he shall be paid overtime rates for such work.

Section 52. Sanitary Regulations. The party of the first part agrees to furnish a clean, healthful, sufficiently ventilated, properly heated and lighted place for the performance of all work of the composing room; and all machines or apparatus operated in the composing room, or in the rooms adjacent thereto, from which dust, gases or other impurities are produced or generated, shall be equipped in such manner as to protect the health of employes.

Section 53. Employees who have held situations during the twelve months ending XX shall be en-

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

tiled to XX weeks' vacation with pay. Those who have held situations during the past XX years shall be entitled to XX weeks' vacation with pay. Substitutes who have worked as extras for the office shall be entitled to one day's vacation for each XX days worked.

Section 54. This agreement shall be effective from November 30, 1940, until November 30, 1941; provided, negotiations shall begin on a new agreement 30 days prior to the expiration date.

Note—In Section 40 specify whether work performed on holidays is to be paid for at price-and-half or double price.

In Section 48 eliminate either subsection (a) or (b) as may be agreed upon in negotiation.

In Sections 3 and 14 day work should be confined to the hours between 7 a.m. and 6 p.m.

In Section 23 see requirements of Sections 20 and 21, Article I, General Laws.

Label Agreement

These Articles of Agreement, Entered into this 30th day of November, A.D. 1940, by and between Clovis News-Journal, party of the first part, and Clovis Typographical Union No. 985, party of the second part.

Witnesseth, That the said party of the first part, in consideration of the use and privileges of the union label, owned and controlled by the said party of the second part, as agents for the International

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

Typographical Union, hereby agrees to employ none but members of Clovis Typographical Union No. 985, party of the second part, not to use the said label or trademark upon anything but the strict production of union labor, and to neither loan nor duplicate said trade-mark, or use the same upon any printed matter without imprint or trading name, except by permission of the party of the second part.

The said party of the first part further agrees to pay the adopted scale of wages of the party of the second part, hereto attached, and to comply with all its laws and those of the International Typographical Union.

Any violation of this agreement shall make it null and void, and all cuts, electrotypes or stamps of the label or trademark of the party of the second part, in the possession of the party of the first part, shall immediately be delivered to the party of the second part, and the further use of the same after such annulment by said party of the first part shall be without warrant and illegal.

This contract shall immediately become null and void in event the charter of the said Clovis Typographical Union No. 985, party of the second part, is suspended or surrendered, and all union labels shall be immediately returned to the proper authorities.

In Witnses Whereof, We have hereunto affixed

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

our hands and seals this 30th day of November, A.D. 1940.

For CLOVIS NEWS-JOURNAL.

(Signed) R. HINDLEY,
Publisher.

For CLOVIS TYPOGRAPHICAL

[Seal] UNION No. 985.

(Signed) EARL C. BOSWELL,
President.

(Signed) J. W. SIMPSON,
Sec. Treas.

Three copies of this contract must be executed, one copy for the employer, one copy for the local union and third copy for files of International Typographical Union.

State of New Mexico,
The County of Curry—ss.

Mary Robbins, being duly sworn, says: That she has carefully compared the foregoing copy of contract with the original thereof, and the attached agreement between the Clovis News-Journal and the Clovis Typographical Union No. 985 dated January 10, 1942; and that said instruments are true and correct copies of the originals.

MARY ROBBINS.

Subscribed and sworn to before me this the 7th day of May, A.D. 1942.

FRED C. THARP,

[Seal] Notary Public.

My commission expires May 26, 1942.

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

January 10, 1942.

1. The contract now in existence to be modified verbally as follows and extended for an indefinite period from November 30, 1941. Either party may open contract for wage adjustments on thirty days written notice after March 30, 1942.
2. The management shall be permitted to employ one apprentice for the first two journeymen and shall be allowed an additional apprentice for the next five journeymen.
3. The management shall be permitted to teach apprentices to operate typesetting machines any time the management considers it to the advantage of the apprentice.
4. Reproduction of type and mats to be handled as has been verbally agreed to in the past which has worked to the satisfaction of both parties.
5. It shall be permissible for the management to work the man lowest in priority between the Clovis News-Journal and the Clovis Printing Plant in any manner the foreman of either shop may see fit, provided he be hired for eight continuous hours exclusive of regular lunch period.
6. The management may work second year apprentices 48 hours per week until December 5, 1942; provided, he shall have regular working hours consisting of eight continuous hours exclusive of regular lunch period six days a week. Also,

(Testimony of C. H. Hoiles.)

Respondent's Exhibit No. 2—(Continued)

he must not be worked unless at least two journeymen printers are working with him.

7. The management will not be called upon to force new employees to join the union. However, no new employee shall be hired without the mutual consent of both parties.
8. The scale of wages shall be increased five cents per hour and shall be retroactive to November 30, 1941, as was agreed to by the management in the first meeting with the members of the union.

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Q. (By Trial Examiner Moslow): How long have you and your father had this interest in this newspaper? A. In New Mexico?

Q. Yes. A. Since November 1, 1935.

Q. What is the circulation of the paper?

A. 7,000.

Q. (By Mr. Sargent): 7,000. Is it not true, Mr. Hoiles, that other than the point permitting the apprentices to operate the machines at any time deemed to their advantage, that there are two other variations of the usual apprenticeship clause contained in this contract? A. Yes, sir.

Mr. Sargent: Your witness.

Q. (By Trial Examiner Moslow): What other variations are you referring to, Mr. Hoiles? [462]

(Testimony of C. H. Hoiles.)

A. One is to the number of hours a second-year apprentice can work, and the other is—what?

Mr. Sargent: The other relates to the greater number of apprentices, does it not?

The Witness: Yes. The management shall be permitted to employ one apprentice for the first two journeymen, and an additional apprentice for the next five journeymen.

Trial Examiner Moslow: You say that is larger than the usual number allowed?

The Witness: Yes.

Trial Examiner Moslow: Cross examine.

Mr. Ryan: I want a standing objection to the introduction of this contract on the ground there is no proof in this record that the Typographical Union, party to this contract, Respondent's Exhibit 2, ever agreed to the verbal modifications.

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record. proceed.

Cross Examination

Q. (By Mr. Ryan): Mr. Hoiles, a Board decision was issued against the company operating the Clovis Journal, isn't that right?

A. News-Journal.

Q. News-Journal. [463]

A. What was that, now?

Q. Was a decision handed down by the National Labor Relations Board which involved the

(Testimony of C. H. Hoiles.)

Clovis, New Mexico, News-Journal, this paper——

Mr. Sargent: I object to the question as being entirely incompetent, irrelevant and immaterial; I don't know whether there was such a decision. If there were, it has no bearing upon this case.

Trial Examiner Moslow: Overruled.

The Witness: Yes, sir.

Trial Examiner Moslow: What is the citation, Mr. Ryan?

Mr. Ryan: It is volume 13, page 1122, National Labor Relations Board Decisions and Orders.

Trial Examiner Moslow: What is the name of the case?

Mr. Ryan: In the matter of R. C. Hoiles, C. H. Hoiles, Harry Hoiles, and Mary Jane Hoiles, doing business under the trade name and style of Clovis News-Journal.

Trial Examiner Moslow: In what way do you contend that decision is relevant to these issues?

Mr. Ryan: Because of evidence introduced in that case to the effect that the respondents persisted in their antipathy toward the union by refusing to embody the terms of the conract in a written, signed agreement.

Mr. Sargent: Mr. Examiner, there is no connecting link at all between that and this, except one of ownership. [464]

Trial Examiner Moslow: No one has yet offered that decision in evidence or asked me to take judicial notice of it. All that has been stated so far was

(Testimony of C. H. Hoiles.)

their decision. Did you hear my last remark, Mr. Ryan?

Mr. Ryan: Yes. For the time being I don't propose to offer it.

Trial Examiner Moslow: I might say, though, the Board probably has the power to note its own decisions without any request therefor. I will look at it during the recess and give you my views on the subject.

Q. (By Mr. Ryan): When the negotiations began in 1940, in March, who was representing the company on those negotiations? A. 1940?

Q. Yes.

A. Mr. Hanna, E. J. Hanna, and myself.

Q. What was Mr. Hanna's position at that time?

A. He was—he carried the title of business manager.

Q. Is that the title you hold now?

A. I hold the combination title of general manager-business manager.

Q. At that time what title did you hold?

A. I was general manager.

Q. Had you been dealing on behalf of the company with the Typographical Union over the previous years since you have become owner of the Register Publishing Company, Ltd.? [465]

A. Yes, sir.

Q. At that time you were, therefore, because of your long experience in dealing with the union, familiar with the by-laws generally; isn't that true?

(Testimony of C. H. Hoiles.)

A. I wouldn't say I had a particularly long experience.

Trial Examiner Moslow: I can't hear you.

The Witness: I wouldn't say I had a particularly long experience dealing with the unions.

Q. (By Mr. Ryan): You already said, I believe, you had been dealing with them since you became an owner of the Register Publishing Company, Ltd.?

A. We dealt once in 1937, which took over several years' time that we dealt with them.

Q. Yes; but you had this contract with them all the time from 1937 until this period in March, 1940? A. That is right.

Q. Do you have a copy of the by-laws and constitution? A. No, sir.

Q. You have had, have you not?

A. I don't remember.

Q. Your father has, doesn't he? Mr. R. C. Hoiles? A. I wouldn't know that.

Q. In your handling of the labor relations for the Register Publishing Company, Ltd., isn't it a fact that you would go back and consult with your father on the progress that was [466] being made?

A. No, sir.

Q. Didn't you ever tell him how you were getting along in the matters under discussion?

A. Oh, I would tell him once in a while what was going on, just like I tell him once in a while what the trial balance is.

Q. Now, when the board of directors sat down

(Testimony of C. H. Hoiles.)

to consider the proposals which they would submit to the union and which they did submit on or about April 29, 1941, did you and your father and these other parties that you have indicated as directors all sit down and decide?

A. Not all of them. There is one or two of them away; Mabel M. and Mabelle S. Hoiles was there.

Q. Some of the members of your family are occupied with papers elsewhere. Is that right?

A. At the present time they are in the Army.

Q. But at that time they were operating papers in Ohio, I believe. Is that right? A. Yes, sir.

Q. So that the only two members of the board of directors here at that time were you and your father? A. No.

Q. Who besides your father and you?

A. Mabel M. and Maybelle S. [467]

Q. Your wife, in other words?

A. His wife and my wife.

Trial Examiner Moslow: Your wife and your mother?

The Witness: That is right.

Q. (By Mr. Ryan): There has been some testimony to the effect that the daughter of R. C. Hoiles whom, I suppose is your sister, worked on a linotype machine one summer vacation. When was that?

A. I think that was in '39, I think it was.

Q. At that time there was a contract in effect between your company and the International Typographical Union. Isn't that right?

(Testimony of C. H. Hoiles.)

A. Yes, sir.

Mr. Sargent: What was that last question?

(The question was read.)

Q. (By Mr. Ryan): At that time your sister was not a member of the International Typographical Union, was she? A. No, sir.

Q. At that time the contract which you had agreed to and which had been in effect for some period of time, with the International Typographical Union, provided for what is in effect a closed shop, isn't that right? That no one should work in the composing room other than members of the Typographical Union? A. Yes, sir. [468]

Mr. Sargent: He has already answered. I object to the question on the ground the contract specifically provides that the apprentices should be under the control of the management for the first year, and that wouldn't apply to an apprentice; therefore, I object to the question.

Trial Examiner Moslow: Objection overruled. What year was this when your sister worked?

The Witness: 1939.

Q. (By Mr. Ryan): In your discussions with the union on the question of your proposal for control over apprentices, isn't it a fact that you at all times insisted that you be given complete control over apprentices as to the number and the work to be done? A. Yes.

Q. Isn't it a fact, further, in the discussions of that matter, Mr. Brown and Mr. Duke pointed out to you that the by-laws of the union specifically

(Testimony of C. H. Hoiles.)

prohibited an outright grant of complete control to you over the apprentices?

A. They said they couldn't give in on that.

Q. Didn't they point out the reason they couldn't give in was because of restrictions imposed on them by their by-laws?

A. They said something about laws, and I asked them what laws, and I asked if they were the laws of the United States.

Q. What did they say?

A. They said union laws. [469]

Q. They said they were union laws. Mr. Hoiles, on the evening preceding the strike, that would be the evening of April 30, 1941, Mr. Duke came to you and advised you that the union was contemplating the strike the next morning. Is that right?

A. Yes, sir.

Q. And isn't it true that you said to him on that occasion that "My father and I", you said something about your father and you "didn't want this thing"? A. I said we were sorry.

Q. And that Mr. Duke thereupon denied your statement that you didn't want it and inferred that it was clear you did, because, he said, "It's clear that you do, because your actions all through the negotiations have indicated you desired it." Isn't that what he said in substance or words to that effect?

Mr. Sargent: No objection—did I understand your question to be: Did Mr. Duke say that to him then?

(Testimony of C. H. Hoiles.)

Mr. Ryan: Yes.

Mr. Sargent: No objection.

The Witness: He might have said that to me, yes.

Mr. Ryan: I have no further questions.

Trial Examiner Moslow: Anything further?

Redirect Examination

Q. (By Mr. Sargent): You have been asked, Mr. Hoiles, about [470] a Labor Board decision against the Clovis paper, owned by partnership of which you are a member. What year did that come?

Trial Examiner Moslow: The date of the decision? I will state for the record it is July 25, 1939.

Q. (By Mr. Sargent): 1939. I ask you whether or not the decision required you to do certain things?

Trial Examiner Moslow: Mr. Sargent, I will take judicial notice of this decision, the order, and so on. It is not necessary to prove anything, that I can see.

Mr. Sargent: I wanted to get one thing in the record I didn't know about a moment ago.

Q. (By Mr. Sargent): Did the Clovis paper ever comply with the terms of the decision?

A. With the terms of what?

Q. Did the Clovis paper ever comply with the parts of the Board's orders, in the Clovis case?

A. No.

Q. Were you ever taken to court to enforce the order? A. Yes.

Q. Was the case prosecuted?

(Testimony of C. H. Hoiles.)

A. The case did not come to trial.

Q. The case did not come to trial?

Trial Examiner Moslow: What is the status now?

Q. (By Mr. Sargent): Was it ever dismissed or not? [471] A. It was taken off the docket.

Trial Examiner Moslow: Why was it? Was there a settlement or what was the matter?

The Witness: We didn't have anything to do with it. The Board took it off the docket.

Trial Examiner Moslow: You say the Board is not pressing for enforcement of its order?

The Witness: Evidently.

Trial Examiner Moslow: And you have never filed a petition yourself to review it?

The Witness: No.

Q. (By Trial Examiner Moslow): How long since it has been on the calendar, in the Circuit Court?

A. It has been on the calendar about 13 or 14 months after—I think 13 or 14 months after the Labor Board decision.

Q. Were briefs served upon you?

A. I didn't get any.

Trial Examiner Moslow: What inference do you want me to draw from these facts, Mr. Sargent?

Mr. Sargent: That the Board didn't take its own order very seriously, or it would have gone to the court on it.

Trial Examiner Moslow: I see.

(Testimony of C. H. Hoiles.)

Q. (By Mr. Sargent): Were you in charge of the labor relations of the Clovis paper?

A. I am the general manager of the Clovis paper. [472]

Q. You are the general manager?

A. Yes, and all matters like that are taken up with me before anything is done.

Q. Under Board's Exhibit 14 in evidence——

Trial Examiner Moslow: I would be very glad to hear your arguments in the case as to the legal effect of that order, Mr. Ryan.

Mr. Ryan: That Clovis order?

Mr. Sargent: I have never seen it, so I want to get a chance to take a look at it.

Mr. Ryan: I haven't offered the case or asked the Board to take judicial notice of it.

Trial Examiner Moslow: I understand. Proceed.

Q. (By Mr. Sargent): Under Board's Exhibit 14 in evidence, being the blank contract which was apparently in effect from 1937 to 1941 in the respondent's composing room, do you know under whose jurisdiction the apprentices are down there, for the first year?

A. From the testimony here, it is under the jurisdiction of the office.

Q. Do you know how long your sister, Jane Hoiles, worked in the composing room of the respondent during the summer of 1939?

A. During part of the summer vacation.

Q. Not to exceed several months?

A. No. [473]

(Testimony of C. H. Hoiles.)

Q. That is, she did not work more than several months? A. That is right.

Q. And how old was your sister at the time?

A. Either 17 or 18.

Q. 17 or 18. And what is the age of the apprentices, usually, when they first come to the paper?

A. Well, they usually are at least that, or a little bit older.

Q. Did you testify this morning that the union had raised no objection to her having worked there during that summer on the linotype machine?

A. That is right.

Q. You testified they made no objection?

A. That is right.

Mr. Sargent: I assume the court will take judicial notice from the contract that it is not necessary for an apprentice to be, and an apprentice cannot join the I.T.U. during the first year of apprenticeship.

That is all.

Q. (By Trial Examiner Moslow): Mr. Hoiles, did you keep your father advised about the course of negotiations with the union in 1940 and 1941?

A. I testified I told him once in a while what went on, but I never told him everything that went on.

Q. The final meeting of the board of directors which was [474] just before the strike, was that attended by your father? A. Yes, sir.

Q. You say that you never had a copy of the

(Testimony of C. H. Hoiles.)

by-laws of the I.T.U. in your possession? Is that what you testified? A. That is right.

Q. Weren't the by-laws part of the contract you signed in 1937 with the I.T.U.?

Mr. Sargent: It wasn't a signed contract.

The Witness: I didn't sign a contract.

Q. (By Trial Examiner Moslow): Weren't the by-laws a part of the oral contract you agreed to in 1937?

A. Well, I never—according to that contract there which I looked over today, it states in there that any additional thing that pertains to the International laws and the local union——

Q. Doesn't the contract provide, first, Section 4-C, "Relation of foremen and employees shall be governed by the laws of the Santa Ana Typographical and the International Typographical Union"?

A. That is what it states there.

Q. Doesn't it also state, Section 3-A, "The apprentices shall be properly schooled as provided in the by-laws and regulations"?

A. (No response.)

Q. You say you never had a copy of the by-laws, never [475] examined those by-laws while dealing with Local No. 579?

A. That is right. You mean by by-laws——

Q. The book of laws of the International Typographical Union. You never examined them?

A. No.

Q. Did you have anything to do with the negotiation of this contract with the Clovis paper?

(Testimony of C. H. Hoiles.)

A. I was advised of the matter and also wrote back my ideas on the thing.

Q. Do you know that the laws of the I.T.U. were a part of the agreement in this Clovis News-Journal? They are made part of the agreement itself? That's in the first clause headed "Witnesseth." You say you knew that or didn't know it?

A. I see it's in there.

Q. Did you know it though?

A. I didn't pay much attention to that part of it there.

Q. Why were Mr. Lawrence's responsibilities increased, four or five days after the strike began?

A. He was made mechanical superintendent.

Q. Who had had that position before?

A. There had been no position like that before.

Q. Between 1935 when you bought control of this newspaper and 1937 when the contract was signed, had you had any contractual relationship with Local 579?

A. I don't remember whether there was any negotiations. [476]

Q. During those two year periods was there any contract governing the relationship?

A. We were working under the past verbal agreement.

Q. You observed the terms of the agreement?

A. Yes.

Q. Had they ever been formally agreed to, or were they just a matter of office or shop practice?

(Testimony of C. H. Hoiles.)

A. We just walked in and took charge and things went on as they had been before.

Q. Mr. Lawrence had been the foreman prior to 1935?

A. He was the foreman when we got there.

Q. But in 1937 there actually were negotiations and then you formally agreed to live up to the terms of the oral contract as modified?

A. Yes, sir.

Trial Examiner Moslow: I have nothing further.

Redirect Examination

Q. (By Mr. Sargent): Mr. Hoiles, did the union ever give you a copy of the International constitution and by-laws?

A. Not to my knowledge.

Q. When did you first see this blank, now Board's Exhibit 14 in evidence, put before you now by the Examiner?

A. This right here (indicating)?

Q. Yes. A. This noon. [477]

Q. This noon. Who brought it in?

A. In here?

Q. Was it brought into your office?

A. Yes.

Q. By whom? A. Mr. Lawrence.

Q. What did he say at the time?

A. That is what he had in his desk.

Q. That is the first time you ever saw it?

A. To my knowledge, the first time I ever saw this contract, yes.

(Testimony of C. H. Hoiles.)

Q. When did you first see the Clovis contract which is now in evidence?

A. When did I first see the Clovis contract? I saw part—this right here? Or this part right here? (Indicating)

Q. When did you ever see Respondent's Exhibit 2? A. So far as some of these——

Q. When did you ever see this?

A. The whole thing?

Q. Yes. A. Saturday.

Q. Saturday. And had you ever seen the contract in toto previous to that time? A. No.

Q. You have already testified, have you not, that you were [478] written for advice by the Clovis manager. What is his name?

A. Mr. Hindley.

Q. And that you had written back your ideas. Is that right? A. Yes, sir.

Q. Had any written contract or any copy of the contract previous to this time been forwarded to you?

A. No, just certain of the provisions like are contained on the back of this here (indicating).

Q. Do you know that there were variations in the apprentice clause, that is, that there were variations in the clauses for apprentices as were argued for by the union in the 1941 negotiations?

A. He advised that there were variations, yes.

Q. Do you remember when you first knew about them?

(Testimony of C. H. Hoiles.)

A. Prior to, some time prior to the signed memorandum that they have here on this contract.

Trial Examiner Moslow: I don't understand that question. Read the question.

(The record was read.)

Trial Examiner Moslow: Which signed memorandum are you referring to?

The Witness: I am referring to the oral agreement here.

Q. (By Trial Examiner Moslow): That is not signed.

A. The agreement was dated January 10th and it is retroactive to November, 1941. [479]

Q. You say some time prior to January 10th?

A. Whenever they had a meeting of the minds.

Q. When was it? Can you fix the date when you first were told of the variations?

A. That is pretty hard to do.

Q. Very well.

Anything else?

Mr. Sargent: That is all.

Q. (By Trial Examiner Moslow) I have one other question: There has been some testimony that you submitted a list of seven proposals back in March, 1940. Do you recall that testimony?

A. Yes, sir.

Q. Did you submit such proposals?

A. Yes, sir.

Q. One of the proposals, if I remember rightly, said something about no discrimination between

(Testimony of C. H. Hoiles.)

union and non-union men. Is that one of your proposals? A. Yes, sir.

Q. What did you mean by that?

A. Just meant that if we found that a man that might be an excellent workman, that it would be possible to put him on.

Q. Without his being a member of the union?

A. Yes.

Q. I notice a statement in one of the editorials, now in [480] evidence, by your father, in which you say it was very difficult to get experienced printers who were not members of the union. Do you know anything at all about that? A. No, sir.

Q. You don't know whether or not it is difficult?

A. Oh, I thought you were referring to the statement. You are asking me if it is difficult. It is difficult to get good printers either union or non-union.

Q. Are there non-union printers equally as qualified as the union printers?

A. You are asking me a question about my shop now?

Q. Generally in the industry, I mean.

A. I would say in my shop now they are just as efficient as they were then.

Q. What did you have in mind when you proposed this no discrimination point?

A. When it came to a point that we had a good man, and there was a good man available, and we needed him, and he wasn't a member of the union, we would have the right to hire him.

(Testimony of C. H. Hoiles.)

Q. Did you have any particular person in mind at that time? A. Oh, no.

Trial Examiner Moslow: Anything else?

Mr. Sargent: No.

Trial Examiner Moslow: You are excused.

(Witness excused.) [481]

Trial Examiner Moslow: Off the record.

(There was a discussion off the record.)

Trial Examiner Moslow: On the record.

Mr. Ryan: The Board rests, and officially I want it to be understood that Mr. Hoiles, on this last testimony, was not my witness. I had rested my case, so far as the last testimony is concerned, bebore he gave it.

Trial Examiner Moslow: I don't pay any attention to whose witness it is. I determine whether he is adverse by his position and his manner of testifying, rather than by who called him.

Mr. Ryan: The Board rests at this time.

Trial Examiner Moslow: Have you a motion to make now, Mr. Sargent?

Mr. Sargent: Yes. I smile, because of the Examiner's statement that the motion is going to be denied before I make it. Therefore, it may take a little of the enthusiasm out of arguing.

Trial Examiner Moslow: Do you want it on the record?

Mr. Sargent: Yes.

Trial Examiner Moslow: I think you ought to explain how the discussion arose, then.

Mr. Sargent: I understand from what you said, Mr. Examiner, this morning, that it was a formal practice on the part of the Examiners to deny a motion to dismiss a complaint [482] for the reason that you deemed it advisable to wait and study all the evidence and the authorities, before reaching such a decision.

Trial Examiner Moslow: Unless it were a clear-cut case.

Mr. Sargent: Unless it were a clear-cut case, as seemed, in your opinion, to open up no other opportunity but to grant the motion. My motion, therefore, will be very brief at this time.

I do now move that the complaint of the Board be dismissed for the reason that, in the first place, it would appear from the evidence that the Board has no jurisdiction over the respondent;

And, second, because the Board, on the merits of the case has established neither that there were unfair labor practices on the part of the respondent; that there was no act or omission on the part of the respondent which would amount to an unfair labor practice in any of the categories mentioned in the complaint by the Board.

As I recall, Mr. Examiner, the charges by the Board are that the respondent was guilty of an unfair labor practice, first, in refusing to bargain as alleged, in good faith with the union; second, that there was a failure to reinstate the workers who went out on strike; and third, there were certain utterances, verbal and written, made by the respond-

ent which [483] are deemed by the Board to be unfair labor practice.

It is our position that the evidence now shows that none of them have been proven, and that the complaint should be dismissed.

Trial Examiner Moslow: I will deny the motion with respect to jurisdiction, and deny the other motions on the merits, as well.

I may point out, however, that the motion, which is in effect directed to paragraph 8, must be denied by me at this time because I prefer to have the transcript before me at the time I rule upon it, although, offhand, it seems there are certain portions of that paragraph which have not been proved by the Board.

Mr. Sargent: Now, do I understand that, from your remarks at the beginning of the case, at the conclusion of the evidence you would welcome argument on the part of counsel in seeking to clarify the evidence, as the Board's attorney and I have noted things which have come before you, and also to take up such authorities as may be pertinent to the case?

Trial Examiner Moslow: Yes. I would like such an argument.

Mr. Sargent: All right.

Respondent now rests, and after Mr. Ryan has given his argument I will prepare to argue from the point of view of [484] the respondent.

Trial Examiner Moslow: I would like to have the argument off the record, unless anyone particularly wants it transcribed.

Mr. Sargent: Off the record.

Trial Examiner Moslow: Off the record.

(There was discussion off the record.)

Trial Examiner Moslow: On the record.

Mr. Ryan: Mr. Examiner, before you say any more, we have just established the dates of the two editorials of this morning, and in view of that fact, I now offer them as Board's Exhibit 11, being an editorial published on May 17, 1941; Board's Exhibit 12, being an editorial published on May 22, 1941. I offer them in evidence.

Trial Examiner Moslow: I presume you have the same objection to these?

Mr. Sargent: Same objection.

Trial Examiner Moslow: I will receive in evidence Board's Exhibits 11 and 12 for the same limited purpose as first announced by Mr. Ryan.

(Thereupon the documents heretofore marked as Board's Exhibits 11 and 12, for identification, were received in evidence.)

BOARD'S EXHIBIT No. 11

Common Ground, by R. C. Hoiles

This column contends there can be no satisfactory progress until we measure the shares of each man by the common yardstick of the God-given equal right to create and enjoy anything anyone else has a right to create and enjoy.

LABOR UNIONISTS AND SELF-RESPECT

The most serious thing about a labor union is that in most cases it cause the members of the union to lose their self-respect—their manhood.

It does this because it teaches the members to demand rights without obligations or duties on the part of the members. No labor organization will make any commitments whatsoever for its members. They will not definitely promise to do anything with a penalty attached for non-performance. Yet they demand of others that they commit themselves to a fixed agreement.

This one-sided demand puts the laboring man in an inferior position. He asks for something that no self-respecting, capable man would ask of another. It puts him in the position of a pirate demanding, under threat of interfering by sudden and simultaneous stoppage of the service being rendered, that he may have the right to do as he pleases without any responsibility whatsoever as to whether or not he works.

This is not the principle on which America was built.

All men have certain rights and certain responsibilities. No man should be relieved of responsibilities by simply joining a laboring group, and expect to have rights. And when labor unions teach their members that they need not commit themselves to anything, they are teaching them to annul their self-respect; their manhood; their ability to look another man squarely in the eye and say, "I am as good as you and you are as good as I am. We both have the same rights and the same responsibilities."

### Makes Classes Out of Men

This method of establishing classes between peo-

ple by demanding rights without responsibility is entirely contrary to democracy and to Christianity. It is a form of tyranny. In fact, the demand and actions of modern labor unionists are very similar to pirates. They demand everything and will only agree not to try to injure the service rendered to the customers if the employer will agree to give them preference.

They talk about arbitrating. But there can be no arbitration when there is no responsibility on one side. It is like arbitrating with a man that you owe him a thousand dollars, when you know you owe him nothing.

Of course, the material loss due to labor unions causes untold misery, suffering and poverty, but the most serious part and the primary cause of all this loss, is the degradation of the character of the men under labor union control. They have had their souls conscripted, their personalities drafted, by the racketeers at the head of the unions. And when they have given up their right to use their best judgment, they lost their conscience.

Of course, few people realize that these things are true. Men who go into the unions do not realize what they are getting into. But when the unions have a right to fine a man or suspend him, when the member does not do as ordered, then the member becomes a serf, a tool, a Charlie McCarthy, a Puppet, a marionnette of the labor racketeers in the background. These labor leaders or drivers are reaping big fees and dues and having positions of

power that they could not attain at all in any legitimate, competitive free market business.

Unless the people of America come to realize the paralyzing effects on the character and the souls of members in labor unions, our unemployment will grow larger and our standard of living will get lower.

This is all contrary to natural law. Under a free society, where men do not want rights without responsibility, as they do in labor unions, the wages of man have always constantly increased from year to year, due to the accumulation of knowledge and better tools.

There is no question that needs public discussion and honest answering of questions more than the actions of labor unions. The columns of this paper are open for any one who will answer questions to refute the above most serious charges.

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Trial Examiner Moslow: It is customary at this time for both parties to move to amend their pleadings to conform to the evidence.

Mr. Ryan: Mr. *Ryan,* I move to conform the complaint to [485] the proof, in so far as the dates and names and places, with no purpose of changing any of the substantive allegations in the complaint.

Trial Examiner Moslow: Will you make a similar motion for your answer?

Mr. Sargent: Yes. I am smiling because I was going to make a facetious remark.

I will make a similar motion, if any be necessary, on the part of the respondent.

Trial Examiner Moslow: Both motions are granted.

You may have until May 22nd, which is a Friday, for the submission of briefs. If, however, by the 19th or 20th you feel you need more time, you may wire me, and if it is convenient for me to allow you more time, I will do so.

There is one thing more before I close the hearing.

Can you state how many employees are employed by the respondent?

Mr. Sargent: All told now?

Trial Examiner Moslow: Yes, approximately.

Mr. Sargent: That is mechanical and non-mechanical?

Trial Examiner Moslow: Everything.

Mr. Sargent: Clerical? My client asks me do you intend to include carrier boys.

Trial Examiner Moslow: Are they on the payroll? No. Apart from carrier boys. [486]

Mr. Sargent: Would this include a part time correspondent too? We are talking about full time employees in the plant?

Trial Examiner Moslow: That is right.

Mr. Sargent: Mr. C. H. Hoiles informs me to the best of his belief, 80 to 85 employees, including all mechanical and non-mechanical employees in the

plant, would cover the present employees of the plant in all departments.

Trial Examiner Moslow: Do you dispute that, Mr. Ryan?

Mr. Ryan: I guess we can agree that is the picture. [487]

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In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

REGISTER PUBLISHING CO., LTD.,
Respondent.

## CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 2, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled, "In the Matter of Register Publishing Co., Ltd. and Santa Ana International Typographical Union No. 579," the same being Case No. C-2225,

before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) First amended charges filed by Santa Ana International Typographical Union No. 579, sworn to March 27, 1942.

(2) Complaint and notice of hearing issued by the National Labor Relations Board April 23, 1942.

(3) Certified copy of order designating Will Moslow, Trial Examiner for the National Labor Relations Board, dated May 2, 1942.

(4) Respondent's answer to complaint, sworn to May 5, 1942.

Items 1-4, inclusive, are contained in the exhibits and included under the following item:

(5) Stenographic transcript of testimony before Trial Examiner Will Maslow on May 7, 8, and 11, 1942, together with all exhibits introduced into evidence.

(6) Copy of Intermediate Report of Trial Examiner Maslow, dated June 11, 1942.

(7) Copy of order transferring case to the Board, dated June 13, 1942.

(8) Copy of respondent's letter, dated June 22, 1942, requesting extension of time to file exceptions.

(9) Copy of letter, dated June 25, 1942, granting all parties extension of time to file exceptions.

(10) Copy of respondent's letter, dated July 2 and 6, 1942, requesting further extension of time to file exceptions.

(11) Copy of letter, dated July 8, 1942, granting respondent further extension of time to file exceptions.

(12) Copy of respondent's letter, dated July 10, 1942, requesting still further extension of time to file exceptions.

(13) Copy of letter, dated July 15, 1942, denying request for still further extension of time to file exceptions.

(14) Copy of respondent's exceptions to the Intermediate Report.

(15) Copy of decision, findings of fact, conclusions of law and order issued by the National Labor Relations Board October 7, 1942, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 3rd day of February, 1943.

[Seal] JOHN E. LAWYER
Chief, Order Section
NATIONAL LABOR RELATIONS BOARD

[Endorsed]: No. 10364. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Register Publishing Co., Ltd., a corporation, Respondent. Transcript of Record. Upon Petition for Enforcement of an Order of The National Labor Relations Board.

Filed February 9, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10364

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

REGISTER PUBLISHING CO., LTD.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

## STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner in the above proceeding, and in conformity with the revised rules of this Court heretofore adopted, hereby states the following points as those upon which it intends to rely in this proceeding:

1. Upon the undisputed facts, the National Labor Relations Act is applicable to respondent.

2. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act.

3. The Board's order is valid and proper under the Act.

Dated at Washington, D. C., this 3rd day of February 1943.

NATIONAL LABOR RELATIONS BOARD
By ERNEST A. GROSS
Associate General Counsel

[Endorsed]: Filed Feb. 9, 1943. Paul P. O'Brien, Clerk.

No. 10390

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

AGNES C. JACOB,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SHIRLEY MAY JACOB,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BEVERLY JEAN JACOB,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

GWENDOLYN E. JACOB,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

# Transcript of Record

**Upon Petitions to Review Decisions of the Tax Court of the United States**

FILED
APR 10 1943
PAUL P. O'BRIEN,
CLERK

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

No. 10390

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

AGNES C. JACOB,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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Respondent.

# Transcript of Record

**Upon Petitions to Review Decisions of the Tax Court of the United States**

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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## APPEARANCES

For Taxpayer:

S. J. BISCHOFF, ESQ.

For Comm'r.:

JOHN PIGG, ESQ.,
R. C. WHITLEY, ESQ.

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Docket No. 108032

AGNES C. JACOB (Alleged Transferee)
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

## DOCKET ENTRIES

1941

Jul. 2—Petition received and filed. Taxpayer notified. Fee paid.

" 2—Copy of petition served on General Counsel.

" 19—Request for circuit hearing in Portland, Oregon filed by taxpayer. 7/21/41 copy served.

Aug. 20—Answer filed by General Counsel.

" 22—Copy of answer served on taxpayer, Portland, Oregon.

Sep. 24—Reply to answer filed by taxpayer. 9/24/41 copy served.

Oct. 10—Hearing set Dec. 15, 1941 at Portland, Oregon.

1941

Nov. 25—Application for subpoena duces tecum to E. W. Barnes filed by taxpayer. Subpoena issued.

Dec. 6—Application for subpoena duces tecum to E. B. Barnes, Central Holding Co., E. W. Barnes, Pres. and James L. Conley filed by taxpayer. 12/8/41 subpoenas (4) duces tecum issued.

" 18-19—Hearing had before Mr. Turner on the merits. Submitted. Consolidated with dockets 108033, 34 and 35. Briefs due in 70 days—replies in 20 days.

1942

Jan. 19—Transcript of hearing of 12/18/41 filed.

" 19—Transcript of hearing of 12/19/41 filed.

Feb. 16—Brief filed by taxpayer.

Mar. 7—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 3/11/42 granted and served 3/12/42.

" 12—Copy of brief served on General Counsel.

" 31—Motion for leave to file the attached reply brief, brief lodged, filed by taxpayer. 3/31/42 granted.

Apr. 1—Copy of motion and reply brief served on General Counsel.

Jul. 23—Findings of fact and opinion rendered, Turner. Decision will be entered under Rule 50. Copy served 8/4/42.

Aug. 18—Computation of deficiency filed by General Counsel.

" 19—Hearing set Sept. 30, 1942 on settlement.

Sep. 30—Hearing had before Mr. Murdock on set-

1942

tlement—not contested. Referred to Mr. Turner for decision.

Oct. 2—Decision entered, Turner, Div. 8.

Dec. 28—Petition for review by U. S. Circuit Court of Appeals for the 9th Circuit with assignments of error filed by taxpayer.

" 28—Proof of service filed by taxpayer.

1943

Feb. 2—Statement of points filed by taxpayer with proof of service thereon. [1*]

" 2—Agreed statement of evidence filed.

" 8—Certified copy of order from the 9th Circuit, extending the time to 3/21/43 to prepare and transmit the record filed.

" 25—Praecipe for record filed by taxpayer.

" 25—Affidavit of service by mail of praecipe filed. [2]

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United States Board of Tax Appeals

Docket No. 108032

AGNES C. JACOB (Alleged Transferee),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

## PETITION

The above named petitioner hereby petitions for a redetermination of the proposed deficiency and

*Page numbering appearing at top of page of original certified Transcript of Record.

transferee liability set forth by the Commissioner of Internal Revenue in his notice of proposed deficiency and transferee liability dated April 8, 1941, bearing the symbols IT:90D:JW, and as a basis of her proceedings alleges as follows:

1. Petitioner is an individual residing in the City of Portland, at 3206 S. E. Knapp Street, Portland, Multnomah County, Oregon. The returns of the Central Holding Company for the periods here involved (taxable year ended June 30, 1938) was filed with the Collector for the District of Oregon.

2. The notice of the deficiency (a copy of which is attached hereto), was mailed to the petitioner under date of April 8, 1941.

3. The taxes in question, in the total sum of $4901.30, were determined by the Commissioner of Internal Revenue as assessable against the Central Holding Company, an Oregon corporation, alleged transferor, [3] for the fiscal year ended June 30, 1938, as follows:

| | |
|---|---|
| Income Tax | $2,693.68 |
| Excess-Profits Tax | $2,207.62 |
| Total | $4,901.30 |

4. The determination of taxes as set forth in the said notice of deficiency and the proposed imposition of the alleged transferee liability upon this petitioner are based upon the following errors:

(a) The respondent erred in determining that petitioner is a "transferee or a transferee of a

transferee of the property of the Central Holding Company."

(b) The respondent further erred in determining that the petitioner received assets of the value of $4901.30 from the Central Holding Company, taxpayer, or any sum whatsoever.

(c) The respondent further erred in determining that the alleged deficiency described in the aforesaid notice of deficiency was determined by the United States Board of Tax Appeals, Docket No. 99258.

(d) The Respondent further erred in determining that Central Holding Company (the taxpayer) was liquidated during the year 1937.

(e) The respondent further erred in determining that there was distributed to and among the stockholders of Central Holding Company (taxpayer), assets of the company during the year 1937 as part of such alleged liquidation. [4]

(f) The respondent further erred in determining that petitioner received assets or property of the Central Holding Company (taxpayer) at said time or at any time either by reason of the alleged distribution of corporate assets to and among the stockholders or by reason of a gift or other transfer without consideration and the Commissioner erred in determining that petitioner received any assets of the said corporation at any time under any circumstances.

(g) The respondent further erred in failing and refusing to determine that all questions of liability for tax and deficiency for the tax year ending

June 30, 1938, of the Central Holding Company and of all persons claimed to be transferees of the assets and property of the Central Holding Company was conclusively adjudicated and determined by the United States Board of Tax Appeals in the proceedings known as Docket No. 99258, and No. 99161 in which proceedings judgments were duly made and entered ajudicating the liability of any and all persons claimed by the Commissioner to be transferees of property or assets of the Central Holding Company.

(h) The respondent further erred in determining that petitioner is a transferee or a transferee of a transferee of the property of the Central Holding Company (taxpayer) and is liable as such for any tax liability of the Central Holding Company described in the aforesaid notice of deficiency.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows: [5]

(a) Central Holding Company was incorporated under the laws of the State of Oregon on or about June 15, 1936, for the purpose of acquiring the real and personal property known as the Welcome Hotel, situated in Burns, Harney County, Oregon.

(b) That on or about July 1, 1936, said Central Holding Company purchased the said Welcome Hotel, took possession thereof, and commenced the operation of the business.

(c) That the said corporation was organized with capital stock consisting of 300 shares of no par value; that upon the formation of the corporation 100 shares of the capital stock of said corporation was subscribed for and issued to Robert T.

Jacob; that your petitioner did not subscribe to or become the owner of any of said capital stock at any time; that 100 shares of the capital stock of said corporation was issued to James L. Conley and 100 shares of said capital stock was issued to E. W. Barnes and Olive G. Barnes.

(d) That said corporation continued the ownership, management and control of said hotel property.

(e) That on July 15, 1937, the Welcome Hotel building and contents was partially destroyed by fire.

(f) That subsequent to said fire the said Central Holding Company decided to continue in the hotel business, either by reconstructing the hotel building which had been partially destroyed by fire, or by the acquisition of other hotel property, and to that end, its officers engaged in obtaining plans, specifications and estimates for reconstruction, negotiated for loans with which to reconstruct said hotel building and/or for the purpose of purchasing other hotel property. [6]

(g) That shortly after the said hotel building was partially destroyed by fire and prior to July 27, 1937, Robert T. Jacob and E. W. Barnes entered into an agreement by the terms of which the said Robert T. Jacob agreed to sell and E. W. Barnes agreed to purchase the 100 shares of the capital stock of the Central Holding Company issued to Robert T. Jacob as aforesaid, at an amount equal to the value thereof to be determined by an accounting; that after such accounting and as a result

thereof, Robert T. Jacob agreed to and did accept in payment of said stock the sum of $20,422.10 which sum was paid as follows: $2,422.10 was paid on or about August 12, 1937, and $18,000.00 was paid on or about August 17, 1937; that said payments were made in cash by the said E. W. Barnes to the said Robert T. Jacob; that your petitioner did not receive the said sum of $20,422.10 or any part thereof nor did your petitioner receive any assets of any kind or character from the said E. W. Barnes or from the Central Holding Company directly or indirectly in connection with said transaction or for any purpose whatsoever; that your petitioner did not at said time or at any other time have any interest in and to the capital stock of the corporation as aforesaid.

(h) That during the time between the fire and the sale of stock by Robert T. Jacob to E. W. Barnes, the Central Holding Company did negotiate for and did purchase property with the funds of the corporation to be used for hotel purposes; it investigated the purchase of numerous hotel properties offered to the corporation; it procured plans and specifications to be made and estimates to be furnished for the reconstruction of the [7] hotel property at Burns, Oregon; that on August 4, 1937, the Central Holding Company purchased the unfinished hotel structure at Hines, Harney County, Oregon, about two miles west of Burns, Oregon, together with the real property upon which the hotel property was located, to-wit:

Lots 2, 3, 4, 5, 6, and 7 in Block 98, Tract 5,

Stafford Derbes & Roy Subdivision in Harney County, Oregon,

and also lots 1 and 8 to 53, inclusive in the same block and tract of the same addition, with the funds of the corporation; that the title thereto was first taken in the name of Mr. and Mrs. E. W. Barnes and was thereafter, to-wit: on November 29, 1937, conveyed to the Central Holding Company by deed recorded on December 3, 1937, in Book 38, Page 38 of Deed Records in the office of the County Clerk of Harney County, Oregon.

(i) That long prior to November 21, 1937, Central Holding Company commenced negotiations with one, Frank Amato for the purchase from him of the hotel property known as the Arlington Hotel at Arlington, Gilliam County, Oregon, and on November 21, 1937, a contract was entered into for the purchase of said hotel building, being

> Lots 8, 9, 10, and 11 in Block A Denny's Addition to the Town of Arlington, Gilliam County, Oregon, and all of Lot 11 in Block A located in J. W. Smith's Plat in the original town of Arlington.
>
> Also Lots 12, 13, 14, and 15, except the west 50 feet thereof, all in Block A, Denny's Addition to the Town of Arlington, Gilliam County, Oregon,

including the real property and the buildings erected thereon and the personal property located therein consisting of furniture and [8] furnishings of said hotel property; that on December 15, 1937, the said Frank Amato conveyed said Arlington Hotel prop-

erty to Central Holding Company by deed dated December 15, 1937, and recorded in the office of the County Clerk of Gilliam County, Oregon, in Book 30, Page 624; that the purchase price of said property was the sum of $50,000.00 which was paid as follows: $15,000.00 by conveyance to Frank Amato of the real property acquired by the Central Holding Company at Hines, Oregon as aforesaid; $23,-868.92, by the execution and delivery by the Central Holding Company to Frank Amato of a purchase money mortgage on the said Arlington Hotel property; $6313.08 in cash, and the balance by the assumption of delinquent taxes against the aforesaid property; that the conveyance was executed by the Central Holding Company and the cash payment of $6,313.08 was made with funds of the corporation; that thereafter the Central Holding Company took possession of said hotel property, changed the name thereof to Welcome Hotel and continued to own and operate said hotel in its own name and for its own benefit until September 21, 1938, when it conveyed the said hotel property to E. W. Barnes and Olive G. Barnes, which conveyance was made by the Central Holding Company.

(j) That on August 17, 1937, when Robert T. Jacob sold the capital stock of the Central Holding Company to E. W. Barnes as aforesaid Central Holding Company was a solvent corporation and continued to be a solvent corporation thereafter and continued to be the owner of hotel property and continued to be engaged in the hotel business.

(k) That the said corporation of Central Hold-

ing Company [9] was not dissolved prior to or at the time of the sale of the stock as aforesaid or at any time thereafter.

(l) That on March 17, 1939, the Commissioner of Internal Revenue sent to Robert T. Jacob, transferee, a notice of deficiency of tax of the Central Holding Company for the fiscal tax year ending June 30, 1938, being the same tax payer and the same tax year involved in this proceeding, and proposed to assess as against the said Robert T. Jacob, a transferee liability for the said tax upon the determination made therein by the Commissioner, that the said Robert T. Jacob was a transferee of property of said Central Holding Company which said notice of deficiency bears the symbols IT:90D: GLB, a true and correct copy of which notice of deficiency together with the statement attached thereto is attached hereto and marked Exhibit "A" and made a part hereof as if herein fully and at length set forth.

(m) That thereafter the said Robert T. Jacob filed with the United States Board of Tax Appeals, a petition for the redetermination of the tax sought to be assessed against him by virtue of the said letter and notice of deficiency which petition was duly prepared and verified according to law and was filed with the United States Board of Tax Appeals within the time provided by law and was assigned Docket No. 99161, a true and correct copy of which petition is attached hereto and made a part hereof as if fully and at length set forth and is marked Exhibit "B"; that the deficiency assess-

ment referred to in the said petition in so far as it was sought to impose on Robert T. Jacob liability as transferee of assets of Central Holding Company (taxpayer), was predicated upon the receipt by [10] Robert T. Jacob of the same fund which is described in the notice of deficiency in this proceeding, to-wit; the receipt by Robert T. Jacob of the aforesaid sum of $20,422.10 and the sum of $4,901.30, which it is alleged in the deficiency notice in this proceeding as received by the petitioner is the same sum which was received by Robert T. Jacob as aforesaid; that thereafter on August 11, 1939, the Commissioner of Internal Revenue filed his Answer to the said last mentioned petition, a true and correct copy of which Answer is attached hereto and made a part hereof as if fully and at length set forth, and marked Exhibit "C"; that in and by said Answer the Commissioner, among other things, alleged; that thereafter said sum of $20,-422.10 which was alleged to have been distributed by Central Holding Company, was paid to the said petitioner, Robert T. Jacob and that by reason thereof the said Robert T. Jacob became liable as transferee of the property of the taxpayer, the Central Holding Company, which sum of $20,422.10 includes the identical sum now alleged in the notice of deficiency to have been received by this petitioner herein; that thereafter and in the time required by law the said Robert T. Jacob filed his reply to the said Answer and issue having been joined in said proceeding, the said cause duly came on for trial before the United States Board of Tax

Appeals on November 29, 1939, before the Honorable C. P. Smith, member of the Board presiding; that while the said trial was in progress the parties to said proceeding stipulated in open court for the entry of a judgment therein in favor of the Commissioner of Internal Revenue and against the transferee named in [11] said proceeding, including the petitioner therein, Robert T. Jacob; that the said Robert T. Jacob stipulated in open court and said stipulation was entered of record as follows:

> "Petitioner, Robert T. Jacob while denying the amount of deficiency and the liability for the transfer, admits that he is transferee and the decision may be entered against him in the amount set forth in the statement of counsel for the taxpayer."

that based upon the said Stipulation made and entered of record in said court and cause, a decision was made and entered therein, a true and correct copy of which decision is attached hereto and made a part hereof as if fully and at length set forth and is marked Exhibit "D"; that thereafter the Commissioner of Internal Revenue filed a Motion in said proceeding to vacate the said decision and judgment and for leave to file an amended answer for the purpose of further litigating in said proceeding the liability of the said Robert T. Jacob named as transferee in said proceeding, for the original tax of Central Holding Company, taxpayer, disclosed by its return for the year ending

June 30, 1938, which is the same tax which is now made the basis of the present transferee proceeding against this petitioner; that petitioner refers to said Motion to vacate the order and decision and for leave to file an answer which is on file in this court in Docket No. 99161, and makes the same a part hereof as if herein fully and at length set forth; that the said Robert T. Jacob opposed said Motion upon the ground, among others that the decision and judgment entered in said proceeding determining his transferee liability, was based upon the Stipulation and agreement of the parties to said proceeding, together with the related proceedings consolidated and tried jointly, that the judgment to be entered upon the Stipulation was to be a full and com- [12] plete settlement and satisfaction and discharge of any and all liability of all transferees including the petitioner, Robert T. Jacob, and that such settlement was made and the said entry of judgment was consented thereto in order to buy peace and determine all controversies concerning any and all tax liability of all parties whether taxpayer or transferees and your petitioner refers to the affidavit filed in opposition to said Motion in said proceeding, Docket No. 99161, as if fully and at length set forth and the same are made a part hereof; that thereafter on the 9th day of April, 1940, the United States Board of Tax Appeals entered an Order and decision in said proceeding, Docket No. 99161, denying the aforesaid Motion, a true and correct copy of which is attached hereto and made a part hereof as if fully

and at length set forth and marked Exhibit "E"; that based upon said decision the United States Board of Tax Appeals made and entered in said proceeding, its Order denying Respondents' said Motion, a true and correct copy of which order is attached hereto and made a part hereof as if herein fully and at length set forth and marked Exhibit "F".

(n) That by virtue of the aforesaid proceedings all claims of the Commissioner of Internal Revenue, respondent herein as against petitioner and as against any and all parties that were liable or might be liable as transferees of property of Central Holding Company for the taxable year ending June 30, 1938, were fully settled and compromised, adjudicated and determined and by reason thereof the respondent is estopped to assert or litigate any claim against any person whomsoever, including the petitioner herein, for liability as transferee or transferee of a transferee for any tax liability of the [13] Central Holding Company, taxpayer, for the aforesaid taxable year;

(o) That after the entry of the aforesaid judgments in the aforesaid proceedings, Robert T. Jacob, named as transferee therein, paid in full to the respondent, the amount of the judgments rendered therein, together with all interest that accrued thereon and the said judgments have been satisfied of record and by reason thereof there is no longer any liability on the part of anyone, including this petitioner for the tax assessed against

Central Holding Company, taxpayer, for said taxable year.

(p) That petitioner did not receive from Robert T. Jacob either as gift or otherwise, the sum of money set forth in the Notice of Deficiency, to-wit; $4901.30, or any sum of money or any property or assets that were at any time the property of Central Holding Company;

(q) That at or about the time that Robert T. Jacob subscribed for the shares of capital stock as aforesaid, Robert T. Jacob promised to make a gift of said capital stock to your petitioner who is the wife of the said Robert T. Jacob and to Shirley May Jacob, Beverly Jean Jacob and Gwendolyn E. Jacob, daughters of Robert T. Jacob, in equal shares as and when said stock could lawfully be issued; that neither the corporation itself nor Robert T. Jacob could issue the said stock as aforesaid because the corporation and Robert T. Jacob were under constract with one, Robert S. Farrell, that the said stock should be held in the name of Robert T. Jacob until a certain indebtedness to the said Robert S. Farrell could be liquidated; that the said indebtedness was not liquidated until after the partial destruction of the hotel as aforesaid and was paid out of the money obtained from the [14] insurance company in settlement of said loss; that because of said oral promise made as aforesaid the said Robert T. Jacob was in doubt as to whether he was the true owner of said stock *or whether he was the true owner of said stock* or whether he held the same in trust for your petitioner and the said

members of his family; that by reason of said doubt the said Robert T. Jacob in making his own tax return for said year, treated himself as being the owner of said stock and reported as revenue, the receipt of the $20,422.10, and paid to the Commissioner of Internal Revenue, income tax thereon, but the said Robert T. Jacob attached to said return, a statement setting forth the promise made to this petitioner and the other members of his family, to transfer said stock to them and called attention to the doubt created thereby; that in order to fully inform the Commissioner of Internal Revenue as to the question of ownership of said stock your petitioner and the other members of the family of said Robert T. Jacob each filed income tax returns during that year in which said sum of $20,422.10, although petitioner did not in fact receive any part thereof, and your petitioner and the other members of the family of Robert T. Jacob paid income tax thereon; that thereafter the Commissioner of Internal Revenue after making a full, complete and extensive examination of the facts relative to the ownership of the said stock, determined that your petitioner and the other said members of the family of Robert T. Jacob were not the owners of said stock and that Robert T. Jacob was in law and equity the owner thereof, that your petitioner and the other members of the family were not stockholders and were not liable for any tax and the Commissioner of Internal [15] Revenue refunded to your petitioner and other members of the family of Robert T. Jacob, the income tax paid by them

are aforesaid; that with the knowledge of all of the aforesaid facts the respondent elected to treat Robert T. Jacob as the owner in law and in equity of the aforesaid stock and the money received in payment thereof and served on the said Robert T. Jacob as transferee, the Notice of Deficiency, dated March 17, 1939, heretofore referred to as Exhibit "A", attached hereto; that in the proceeding, Docket No. 99161 filed by Robert T. Jacob alleged Transferee, as aforesaid, marked Exhibit "B", the said Robert T. Jacob again set forth the facts in reference to the ownership of said stock, but notwithstanding said allegations the respondent by his answer served and filed in said proceeding, again elected to treat the said Robert T. Jacob as the owner in law and equity of said stock and the monies received in payment thereof and to treat the said Robert T. Jacob as the transferee and with knowledge of all of the facts the respondent stipulated in said proceeding in open court that Robert T. Jacob was the transferee as aforesaid and judgment was entered therein on said transferee liability against the said Robert T. Jacob and by reason of the premises respondent has made an irrevocable and conclusive election to treat the said Robert T. Jacob as the owner of said stock in law and in equity and of the funds received in payment thereof and as the transferee of assets of the said Central Holding Company. [16]

Wherefore, the petitioner prays that this Board may hear the proceeding and that it may be determined:

(a) That petitioner is not a transferee or a transferee of a transferee of any assets of the Central Holding Company;

(b) That the deficiencies determined by the respondent are erroneous.

(sd) S. J. BISCHOFF,
Counsel for Petitioner.
Post Office Address:
1116 Public Service
Building,
Portland, Oregon.

(Duly Verified.) [17]

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No. 21536-O SN-IT-1

Treasury Department
Internal Revenue Service
Seattle, Wash.

April 8, 1941.

IT:90D:JW
Mrs. Agnes C. Jacob,
3206 S. E. Knapp Street,
Portland, Oregon.

Madam:

You are advised that there will be assessed against you the amount of $2,693.68, income tax, and the amount of $2,207.62, excess-profits tax, plus interest as provided by law, constituting your liability as transferee of assets of Central Holding Company, 1226 American Bank Building, Portland,

Oregon, for unpaid income and excess-profits taxes in the above amounts, plus interest as provided by law, due from said Central Holding Company for the taxable year ended June 30, 1938, as shown in the statement attached.

* * * * * * *

Respectfully,
GUY T. HELVERING,
Commissioner,
By (Signed) GEO. C. EARLEY,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.
JW:sm [19]

STATEMENT

Central Holding Company, Transferor,
1226 American Bank Building,
Portland, Oregon

Tax Liability for the Taxable Year Ended June 30, 1938
Mrs. Agnes C. Jacob, Transferee,
3206 S. E. Knapp Street,
Portland, Oregon.

| | | |
|---|---|---|
| Income Tax (Original, per return) | | $3,163.80 |
| Excess-profits tax (Original, per return) | | 2,844.02 |
| Income tax deficiency | $1,875.48 | |
| Less: Amount paid | 800.66 | 1,074.82 |
| Excess-profits tax deficiency | $ 1,098.88 | |
| Less: Amount paid | 469.13 | 629.75 |
| Total unpaid income and excess-profits taxes | | $7,712.39 |

| | |
|---|---|
| Liability limited to the value of assets received: | |
| Income tax | $2,693.68 |
| Excess-profits tax | 2,207.62 |
| Total | $4,901.30 |

Inasmuch as the value of assets received by you amounted to $4,901.30, your liability as transferee is limited to that amount.

The correctness of the amount of the deficiencies due from Central Holding Company, 1226 American Bank Building, Portland, Oregon, has been determined by order of the United States Board of Tax Appeals, Docket No. 99258. Your right to petition, therefore, relates only to your liability as transferee. [20]

The records of this office indicate that the Central Holding Company, an Oregon corporation, was liquidated during the year 1937, at which time all the assets of that company were distributed to and among its stockholders, and that you received assets or property of that company, either by reason of such distribution of the corporate assets to and among the stockholders, or by reason of a gift, or other transfer without consideration, from a stockholder of that company, to the extent or in the value of $4,901.30. Said amount of $4,901.30 represents your liability, exclusive of interest as provided by law, under Section 311 of the Revenue Act of 1936, as a transferee, or as a transferee of a transferee of the property of the Central Holding Company, for unpaid income taxes and excess-

profits taxes due and owing from that company for the fiscal year ended June 30, 1938. [21]

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EXHIBIT A

No. 21536-O SN-IT-1

Treasury Department
Internal Revenue Service
Seattle, Wash.

March 17, 1939

IT:90D:GLB
Mr. R. T. Jacob, Transferee,
917 Public Service Building,
Portland, Oregon.

Sir:

You are advised that the determination of the income tax liability of Central Holding Company, Portland, Oregon, for the year ended June 30, 1937, discloses a deficiency of $3,930.34 and $1,965.17 in penalty, and that the determination of its excess-profits tax liability for such year discloses a deficiency of $1,382.16 and $691.08 in penalty, and that the determination of such company's income and excess-profits tax liabilities for the year ended June 30, 1938, discloses deficiencies in the respective amounts of $1,875.48 and $1,098.88 as shown by the attached statement, which deficiencies and penalties plus interest as provided by law, it is proposed to assess against you as transferee of the assets of said

corporation, in accordance with the provisions of Section 311 of the Revenue Act of 1936.

* * * * * * *

Respectfully,

GUY T. HELVERING,
Commissioner,

By (Signed) GEO. C. EARLEY,
Internal Revenue Agent in Charge.

Enclosures:
Statement
Form of waiver

GLB:EGG [22]

IT:90D:GLB

STATEMENT

Central Holding Company, Transferor,
1226 American Bank Building,
Portland, Oregon

Liability for Income and Excess-profits Taxes
for the Taxable Years Ended June 30, 1937 and 1938

Mr. R. T. Jacob, Transferee,
917 Public Service Building,
Portland, Oregon.

Fiscal Year Ended June 30, 1937

| | Deficiency | Penalty |
|---|---|---|
| Income Tax | $3,930.34 | $1,965.17 |
| Excess-profits Tax | 1,382.16 | 691.08 |
| Totals | $5,312.50 | $2,656.25 |

Fiscal Year Ended June 30, 1938

| | Deficiency |
|---|---|
| Income Tax | $1,875.48 |
| Excess-profits Tax | 1,098.88 |
| Total | $2,974.36 |

The records of this office disclose that assets of the Central Holding Company were transferred to you on or about August 17, 1937.

A penalty equal to 50 percentum of the total amount of the deficiencies in income and excess-profits tax for the taxable year ended June 30, 1937, has been added in accordance with the provisions of Section 293(b) of the Revenue Act of 1936 [23]

The above-mentioned deficiencies represent your liability under Section 311 of the Revenue Act of 1936 as a transferee of the assets of the Central Holding Company, Portland, Oregon, for deficiencies of income and excess-profits taxes and penalties due from the Central Holding Company for the fiscal years ended June 30, 1937, and June 30, 1938. [24]

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## EXHIBIT B

United States Board of Tax Appeals

Docket No. 99161

ROBERT T. JACOB (Alleged Transferee),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

## PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency and proposed

transferee liability set forth by the Commissioner of Internal Revenue in his notice of deficiency and proposed transferee liability dated March 17, 1939, bearing the symbols IT:90D:GLB, and as a basis of his proceeding alleges as follows: [30]

* * * * * * *

(p) The respondent further erred in determining that petitioner is a transferee of assets of the Central Holding Company and is liable as a transferee for any tax liability of the Central Holding Company described in aforesaid notice of deficiency.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Central Holding Company was incorporated under the laws of the State of Oregon on or about June 15, 1936, for the purpose of acquiring the real and personal property known as the Welcome Hotel, situated in Burns, Harney County, Oregon. and to engage in the hotel business.

(b) That on or about July 1, 1936, Central Holding Company purchased the said Welcome Hotel, took possession thereof, and commenced the operation of the business.

(c) That Central Holding Company acquired said hotel property, both real and personal, for the sum of $42,848.10, of which $19,848.10 was paid in cash to the vendor and others, for the title to be cleared and the liquidation of claims asserted against the property, and $23,000.00 by the assumption of delinquent taxes against the property.

(d) That prior to the formation of said corporation, E. W. Barnes held a contract for the purchase of said hotel, in which James L. Conley claimed or

had some interest, the nature of which is to petitioner unknown; that they did not have and were unable to raise the money necessary to pay the cash portion of the aforesaid purchase price; that the said Barnes and Conley thereupon proposed to petitioner that if he would raise the money needed to complete the said purchase, they would give him an undivided one-third interest in the property to be acquired under said contract; that petitioner thereupon negotiated a loan of $15,000.00 from one Robert S. Farrell to be used in making the aforesaid cash payment, which loan was to be secured by a mortgage on the Welcome Hotel property to be acquired as aforesaid, and in addition thereto petitioner was to execute a mortgage on his own real property consisting of a town site located near Bonneville Dam, Oregon, and a residence property at Seaside, Oregon; that in addition to [32] said security, the said Farrell demanded, as a condition for making said loan, that petitioner should have control of the corporation to be formed for the purpose of taking title to said property, and to that end petitioner should, during the entire period of time that the said loan remained unpaid, be the owner of at least 51% of the capital stock of said corporation; that prior to the formation of the corporation, it was agreed between the petitioner and the said Barnes and Conley that the capital stock of the corporation should be divided equally among the three parties, one-third thereof to petitioner, one-third to E. W. Barnes, and one-third to James L. Conley, and it was further agreed, in order to comply with the

aforesaid conditions imposed by the said Farrell, that E. W. Barnes and James L. Conley would each deliver to petitioner a sufficient number of shares of capital stock so that the total of all stock held by petitioner would equal at least 51% of the total capital stock of the corporation, but that the stock to be delivered by the said Barnes and Conley to petitioner as aforesaid should be held in trust by petitioner until the mortgage loan of the said Farrell was liquidated, at which time the said stock should be returned to the respective parties; that at or about the time the agreement was made, and prior to the issuance of any certificates of capital stock, petitioner promised to make a gift of his shares of capital stock in said corporation to be formed as aforesaid to the members of his family, to be divided equally among petitioner's wife, Agnes C. Jacob, and three daughters, Gwendolyn E. Jacob, Shirley M. Jacob and Beverly J. Jacob; that petitioner informed his wife and daughters, prior to the issuance of the certificates of capital stock, that he would give them the said stock in the proportions named, but that he would be compelled to retain the stock in his own name temporarily until such time as the loan of said Farrell was liquidated for the purpose of complying with the aforesaid condition imposed by the said Farrell, and agreed to transfer the stock to them as soon as the obligation to said Farrell to hold said stock was terminated; that pursuant to the aforesaid understanding between the parties, the corporation was organized with capital stock consisting of 300 shares

of no par value; that upon the formation of the corporation, a certificate for 100 shares of capital stock was issued to petitioner in his name in accordance with the aforesaid understanding, which petitioner took and held in trust for his wife and three children; one certificate was issued to E. W. Barnes for 73½ shares of stock and a second certificate was issued to him for 26½ shares, which latter certificate the said Barnes endorsed and delivered to petitioner to be held in trust for the purposes aforesaid; that one certificate was issued to James L. Conley for 73½ shares and another certificate for 26½ shares, which latter certificate the said Conley endorsed and delivered to petitioner to be held in trust for the purposes aforesaid; that the said Farrell made the aforesaid mortgage loan to the corporation, secured in the manner set forth above, upon the condition that petitioner would retain the aforesaid stock in his name and be in a position to control the corporation as long as the loan remained unpaid; that thereafter the corporation continued to function as such in the ownership, management and control of said hotel property.

(e) That on July 15, 1937, the Welcome Hotel building and contents was destroyed by fire, which consumed all of the hotel building proper except that portion of the building containing the heating plant and some apartments and stores. [33]

(f) That subsequent to said fire, the Central Holding Company planned to continue operations and engage in the hotel business, either by reconstructing the hotel building which had been de-

stroyed by fire or by the acquisition of other hotel property, and to that end, its officers engaged in obtaining plans, specifications, and estimates for reconstruction, negotiated for loans with which to reconstruct said hotel building and/or for the purchase of other hotel property.

(g) That on or about July 27, 1937, the exact date being to petitioner unknown, the Central Holding Company, acting through the said Barnes and Conley, borrowed the sum of $10,000.00 from the United States National Bank of Portland, Oregon, which loan was secured by an assignment of two policies of fire insurance totaling $13,000.00 upon the property destroyed by fire, and with the monies thus obtained the Central Holding Company paid to Robert S. Farrell the balance owing to him upon the aforesaid mortgage loan.

(h) That on or about July 27, 1937, when said payment to Robert S. Farrell was made, petitioner was released from the obligation to retain legal ownership of at least 51% of the capital stock of the corporation, and thereupon petitioner returned to E. W. Barnes the aforesaid certificate for 26½ shares theretofore delivered to petitioner, and returned to James L. Conley the certificate for 26½ shares of stock formerly delivered to petitioner by the said Conley, and at the same time surrendered the original certificate of stock issued to petitioner for 100 shares and caused to be executed and delivered new certificates of stock in lieu thereof as follows: a certificate to petitioner for one share; a certificate to Agnes C. Jacob for 24 shares; certifi-

cates to Gwendolyn E. Jacob, Shirley M. Jacob and Beverly J. Jacob for 25 shares each. That the certificates so executed and delivered on or about July 27th were in pursuance of the gift made to the members of petitioner's family in accordance with the agreement and understanding referred to above.

(i) That shortly after the said hotel building was destroyed by fire and prior to July 27, 1937, petitioner and said E. W. Barnes entered into an agreement by the terms of which petitioner agreed to sell and E. W. Barnes agreed to purchase the one hundred shares of capital stock of Central Holding Company issued to petitioner as aforesaid and held by him in trust for the members of his family, and the said Barnes agreed to pay therefor an amount equal to the value thereof as determined by an accounting; that petitioner entered into said agreement with the said Barnes for and on behalf of the aforesaid members of his family; that for that purpose the said E. W. Barnes procured one John McGrath, bookkeeper for the Central Holding Company, to prepare a statement of the accounts of the company, and petitioner agreed to accept payment in accordance with the net worth of the company as disclosed by said account, and as a result thereof agreed to and did accept in payment of said stock the sum of $20,422.10. That $2,422.10 thereof was paid on or about the 12th day of August, and $18,000.00 was paid by said E. W. Barnes on August 17, 1937; that at the time of the payment of the sum of $18,000.00 as aforesaid, petitioner delivered to E. W. Barnes the aforesaid five certifi-

cates of stock formerly issued to petitioner and the members of his family as afore- [34] said, all of which certificates were endorsed by the respective owners thereof prior to delivery; that at the said time petitioner delivered to the said Barnes a written resignation, resigning as Secretary and Director of the Central Holding Company; that since the sale and transfer of the stock to E. W. Barnes, as aforesaid, neither petitioner nor the aforesaid members of his family have had any interest in the Central Holding Company whatsoever.

(j) That during the period of time between the fire and the sale of the stock to E. W. Barnes as aforesaid, the Central Holding Company was engaged in negotiating for and did purchase property with the funds of the corporation to be used for hotel purposes; it investigated the purchase of numerous hotel properties offered to the corporation; it procured plans and specifications to be made and estimates to be furnished for the reconstruction of the hotel property on the site of the Welcome Hotel; that on August 4, 1937, the Central Holding Company purchased the unfinished hotel structure at Hines, Harney County, Oregon, about two miles west of Burns, Oregon, with funds of the corporation, said property being

> Lots 2, 3, 4, 5, 6, and 7 in Block 98, Tract 5, Stafford Derbes & Roy Subdivision in Harney County, Oregon,

and also acquired Lots 1 and 8 to 53, inclusive, in the same block and tract of the same addition, with funds of the corporation; that the title thereto was

first taken in the names of Mr. and Mrs. E. W. Barnes and was thereafter, to wit: on November 29, 1937, conveyed to the Central Holding Company by deed recorded on December 3, 1937, in Book 38, Page 38 of Deed Records in the office of the County Clerk of Harney County, Oregon.

(k) That long prior to November 21, 1937, Central Holding Company commenced negotiations with one Frank Amato for the purchase from him of a hotel property known as the Arlington Hotel at Arlington, Gilliam County, Oregon, and on November 21, 1937, a contract was entered into for the purchase of said hotel, being

> Lots 8, 9, 10 and 11 in Block A Denny's Addition to the Town of Arlington, Gilliam County, Oregon, and all of Lot 11 in Block A located in J. W. Smith's Plat in the original town of Arlington.
>
> Also Lots 12, 13, 14, and 15, except the west 50 feet thereof, all in Block A, Denny's Addition to the Town of Arlington, Gilliam County, Oregon,

including the real property and the personal property located thereon consisting of furniture and furnishings of said hotel property; that on December 15, 1937, the said Frank Amato conveyed said Arlington Hotel property to Central Holding Company by deed dated December 15, 1937, and recorded in the office of the County Clerk of Gilliam County, Oregon, in Book 30, Page 624; that the purchase price of said property was the sum of $50,000.00,

which was paid as follows: $15,000.00 by conveyance to Frank Amato of the real [35] property acquired by the Central Holding Company at Hines, Oregon, as aforesaid; $23,868.92 by the execution and delivery by the Central Holding Company to Frank Amato of a purchase money mortgage on the said Arlington Hotel; $6,313.08 in cash, and the balance by the assumption of delinquent taxes against the aforesaid property; that the promissory note secured by said purchase money mortgage was executed by the Central Holding Company, and the cash payment of $6,313.08 was made with funds of the corporation.

(l) That thereafter the Central Holding Company continued to own and operate the said hotel in its own name and for its own benefit until September 21, 1938, when it conveyed the said Arlington Hotel property to E. W. Barnes and Olive G. Barnes, which conveyance was made by the Central Holding Company.

(m) That on August 17, 1937, when petitioner sold the stock for and on behalf of the members of his family to E. W. Barnes as aforesaid, Central Holding Company was a solvent corporation and continued to be a solvent corporation thereafter and continued to be the owner of hotel property and engaged in the hotel business until September 21, 1938, when it conveyed the property as aforesaid.

(n) That the said corporation was not dissolved prior to, at the time of the sale of the stock as aforesaid, or at any time thereafter.

(o) That during the fiscal year ending June 30, 1937, the gross income of the said corporation from all sources did not exceed the sum of $37,-881.90; that the deductible expenses of said corporation during said year were in excess of the sum of $26,895.23; that during said fiscal year the physical properties of said corporation depreciated in the sum of $3,228.25; that during said fiscal year the net taxable income of said corporation did not exceed the sum of $7,758.42.

(p) That the net income for the fiscal year ending June 30, 1938, derived by Central Holding Company from the operation of the Welcome Hotel at Burns, Oregon, and the profit realized from the insurance money collected by reason of the destruction of the Welcome Hotel did not exceed the sum of $18,705.35, but petitioner has no knowledge or information sufficient to form a belief as to the net income earned or loss sustained by Central Holding Company during said taxable year by reason of the operation by it of the hotel at Arlington, Oregon, or from any other sources.

(Duly verified.) [36]

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## EXHIBIT C

[Title of Board and Cause.]

## ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel,

Bureau of Internal Revenue, and for answer to the petition filed herein, admits, denies and alleges as follows:

* * * * * * *

4. Denies that he erred in his determination of the deficiencies in tax and penalties as shown by the notice of deficiency from which the petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in subparagraphs (a) to (p), inclusive, of paragraph 4 of the petition.

5 (a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c). Admits that the Central Holding Company acquired said hotel property, both real and personal. Denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d). Admits that petitioner negotiated a loan of $15,000.00 from one Robert S. Farrell, to be used in making the required cash payment on account of the purchase price of said hotel; that it was agreed between the petitioner and the said Barnes and Conley that the capital stock of the corporation should be divided equally among the three parties, one-third thereof to petitioner, one-third to E. W. Barnes and one-third to Jas. L. Conley; that it was further agreed, in order to comply with certain conditions imposed by said Farrell, that E. W. Barnes and Jas. L. Conley would each deliver to petitioner a sufficient number of shares of the capital stock so that the total of all the stock

held by the petitioner would equal at least 51% of the total capital stock of the corporation, but that the stock to be delivered by the said Barnes and Conley to petitioner, as aforesaid, should be held by petitioner until the loan of the said Farrell was liquidated, at which time the [38] said stock should be returned to the respective parties; that the corporation was organized with capital stock consisting of 300 shares of no par value; that upon the formation of the corporation, a certificate for 100 shares of the capital stock was issued to petitioner in his name; that one certificate was issued to E. W. Barnes for 73½ shares of stock and that a second certificate was issued to him for 26½ shares, which latter certificate the said Barnes endorsed and delivered to petitioner; that one certificate was issued to Jas. L. Conley for 73½ shares and another certificate for 26½ shares, which latter certificate the said Conley endorsed and delivered to petitioner. Denies the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition. Alleges that the loan negotiated by petitioner from Robert S. Farrell in the amount of $15,000.00, as aforesaid, was made by said Farrell to petitioner and his associates, to wit: E. W. Barnes and Jas. L. Conley, on the condition that petitioner own at least 51% of the equity in the property to be thereafter acquired, and which was in fact thereafter acquired by the Central Holding Company, as aforesaid.

(e). Admits the allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

(g). Admits that on or about, to wit: July 27, 1937, there was paid to Robert S. Farrell the balance owing him upon the aforesaid loan. Denies the remaining allegations contained in subparagraph (g) of paragraph 5 of the petition.

(h). Admits that on or about, to wit: July 27, 1937, when said payment to Robert S. Farrell was made, petitioner returned to E. W. Barnes the aforesaid certificate for 26½ shares, theretofore delivered to petitioner, and returned to Jas. L. Conley the certificate for 26½ shares of stock, formerly delivered to petitioner by the said Conley. Denies the remaining allegations contained in subparagraph (h) of paragraph 5 of the petition.

(i). Denies the allegations contained in subparagraph (i) of paragraph 5 of the petition.

(j), (k) and (l). For lack of sufficient information upon the basis of which to form a belief as to the truth *of* falsity thereof, denies the allegations contained in subparagraph (j), (k) and (l) of paragraph 5 of the petition.

(m). Denies the allegations contained in subparagraph (m) of paragraph 5 of the petition.

(n). For lack of sufficient information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in subparagraph (n) of paragraph 5 of the petition.

(o) and (p). Denies the allegations contained in subparagraphs (o) and (p) of paragraph 5 of the petition. [39]

6. Denies generally and specifically each and every material allegation contained in the petition herein, not hereinbefore specifically admitted, qualified, or denied.

7. Further answering the petition herein, the respondent alleges as follows:

(a). That on, to wit: March 3, 1939, there was assessed by respondent against the Central Holding Company, an Oregon corporation, in accordance with law in such case made and provided, deficiencies in respect of the income tax and excess-profits tax in the respective amounts of, to wit: $3,930.34 and $1,382.16, together with penalties in the respective amounts of, to wit: $1,965.17 and $691.08, determined by him, the respondent, to be due and owing by said Central Holding Company for its taxable fiscal year ended June 30, 1937.

(b). That on, to wit: March 3, 1939, there was assessed by respondent against the Central Holding Company, an Oregon corporation, in accordance with law in such case made and provided, deficiencies in respect of the income tax and excess-profits tax in the respective amounts of, to wit: $1,875.48 and $1,098.88, determined by him, the respondent, to be due and owing by said Central Holding Company for its taxable fiscal year ended June 30, 1938.

(c). That although payment of the deficiencies in income tax and excess-profits tax and penalties, as assessed against Central Holding Company, as aforesaid, has been duly demanded by respondent in accordance with law in such case made and provided, together with interest thereon as provided

by law, the said Central Holding Company has refused and still refuses to pay the same.

(d). That on or about, to wit: August 17, 1937, the only assets or property of value owned by said Central Holding Company consisted of, to wit: cash in the amount of, to wit: $58,466.30 and certain real and personal property situate at Hines, Oregon, of a then value of, to wit: $2,800.00.

(e). That on or about, to wit: August 17, 1937, the said Central Holding Company became a liquidated corporation, and has since so remained by reason of the fact that on that date, to wit: August 17, 1937, the said Central Holding Company distributed to and among its stockholders, according to their respective stock interests in said company, all and every of its assets and properties of value of whatever kind and nature whatsoever; that the assets and properties so distributed by said Central Holding Company to and among its stockholders, as aforesaid, consisted of cash in the amount of, to wit: $58,466.30 and certain real and personal property situate at Hines, Oregon, of a value, as at the time of such distribution and liquidation, as aforesaid, of, to wit: $2,800.00.

(f). That by reason of the liquidation and distribution by said Central Holding Company of its assets and properties to any among its stockholders, as aforesaid, said Central Holding Company then became and now is without assets or property out of or against which the respondent, on behalf of the [40] United States, may proceed for the purpose of

collecting the deficiencies in income tax and excess-profits tax and penalties due and owing by said Central Holding Company for the fiscal years ended June 30, 1937, and June 30, 1938, in the aggregate amount of, to wit: $10,943.11, as aforesaid, together with interest thereon as provided by law.

(g). That as at the time of the liquidation of and distribution by said Central Holding Company of its assets and property to and among its stockholders on, to wit: August 17, 1937, as aforesaid, the petitioner herein was a stockholder in the said Central Holding Company; that as such stockholder, and without consideration, there was distributed by the said Central Holding Company to the petitioner on, to wit: August 17, 1937, assets and property, consisting of cash, in the amount of, to wit: $20,422.10.

(h). That by reason of the premises, the petitioner became and now is liable, as a transferee of the property of the taxpayer, the said Central Holding Company, for the deficiencies in income tax and excess-profits tax and penalties due and owing by said Central Holding Company for the fiscal years ended June 30, 1937, and June 30, 1938, in the aggregate amount of, to wit: $10,943.11, together with interest thereon as provided by law.

Wherefore, it is prayed that the Board may hear the proceeding and determine and hold: (1) that there are due and owing by the Central Holding Company, now a liquidated Oregon corporation, deficiencies in income tax and excess-profits tax for the fiscal year ended June 30, 1937, in the respective amounts of $3,930.34 and $1,382.16; (2) that there

are due and owing by the said Central Holding Company, now a liquidated Oregon corporation, penalties for the fiscal year ended June 30, 1937, in the respective amounts of, to wit: $1,965.17 and $691.08; (3) that there are due and owing by said Central Holding Company, now a liquidated Oregon corporation, deficiencies in income tax and excess-profits tax for the fiscal year ended June 30, 1938, in the respective amounts of, to wit: $1,875.48 and $1,098.88; (4) that petitioner is liable, as a transferee of the property of the taxpayer, the Central Holding Company, for the deficiencies in income tax and excess-profits tax and penalties due and owing by said taxpayer for the fiscal years ended June 30, 1937, and June 30, 1938, in the aggregate amount of, to wit: $10,943.11, together with interest thereon as provided by law; and (5) that respondent is entitled to such other and additional relief as to the Board may seem fit and proper.

(Signed) J. P. WENCHEL
(Initialed) J. H. P.
J. P. WENCHEL,
Chief Counsel, Bureau
of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
B. H. NEBLETT,
JOHN H. PIGG,
Special Attorneys,
Bureau of Internal Revenue. [41]

EXHIBIT D

[Title of Board and Cause.]

DECISION

Pursuant to the stipulation of deficiencies of the parties in the above-entitled proceeding read into the record at the hearing on Novemebr 30, 1939, it is

Ordered and Decided that the petitioner is liable as a transferee of the assets of the Central Holding Co. for deficiencies in income and excess-profits taxes due from that company for the fiscal year ended June 30, 1937 (including 50 percent additions thereto) of $3,793.08 and $1,322.43, respectively; and for the fiscal year ended June 30, 1938, of $1,875.48 and $1,098.88 income and excess-profits taxes, respectively.

(Signed) CHARLES P. SMITH
Member.

Enter:
CPS:aa.

Entered Dec. 1939. [42]

EXHIBIT E

United States Board of Tax Appeals
Washington

Docket No. 99161

ROBERT T. JACOB (Alleged Transferee),
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

Pursuant to a stipulation made at a hearing of the above-entitled proceeding at Portland, Oregon, on November 30, 1939, the Board entered its decision of tax liabilities on December 5, 1939. On March 1, 1940, the respondent filed a motion with the Board asking that its decision in the above-entitled cause be vacated, set aside, and held for naught upon the ground, principally, that the tax liability determined did not cover unpaid tax liabilities of the Central Holding Co., the transferor, which had been assessed against that company. The Board discovering that the decision entered December 5, 1939, was not in accordance with the stipulation in that it failed to provide for interest upon the tax liabilities, it vacated its decision by an order entered March 4, 1940, and ordered the parties litigant to file with the Board on or before April 3, 1940, briefs in support of or against the motion filed by the respondent. Such briefs have been filed

and carefully considered. The respondent's brief was accompanied with a motion filed March 27, 1940, "for leave to file amended answer" for the purpose of increasing the transferee liability of the petitioner. For reasons stated in a Memorandum Sur Order attached hereto, it is—

Ordered that the respondent's motions filed March 1, 1940, and March 27, 1940, be and the same are hereby denied.

(Signed) CHARLES P. SMITH
Member.

Dated: April 9, 1940.
CPS:aa. [43]

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[Title of Board and Cause.]

S. J. Bischoff, Esq., for the petitioner.

T. M. Mather, Esq., and
Alva C. Baird, Esq.,
for the respondent.

## MEMORANDUM SUR ORDER

Smith: On March 17, 1939, respondent sent a deficiency notice to the Central Holding Co., 1226 American Bank Bldg., Portland, Oregon, reading in part as follows:

> "You are advised that the determination of your income tax liability for the taxable year ended June 30, 1937, discloses a deficiency of

> $3,930.34 and $1,965.17 in penalty, and that the determination of your excess-profits tax liability for the year mentioned discloses a deficiency of $1,382.16 and $691.08 in penalty, and that the determination of your income tax liability for the taxable year ended June 30, 1938, discloses a deficiency of $1,875.48 and that the determination of your excess-profits tax liability for the year mentioned discloses a deficiency of $1,098.88 as shown in the statement attached. Said deficiencies have been assessed under the provisions of the internal revenue laws applicable to jeopardy assessments."

The petitioner appealed to this Board from the determination of the deficiencies, Docket No. 99258.

On March 17, 1939, the respondent sent notices of deficiency to R. T. Jacob, Transferee, Portland, Oregon, E. W. Barnes, Transferee, Portland, Oregon, Olive G. Barnes, Portland, Oregon, and James L. Conley, Transferee, Portland, Oregon, the first paragraph of which reads as follows:

> "You are advised that the determination of the income tax liability of Central Holding Company, Portland, Oregon, for the year ended June 30, 1937, discloses a deficiency of $3,930.34 and $1,965.17 in penalty, and that the determination of its excess-profits tax liability for such year discloses a deficiency of $1,382.16 and $691.08 in penalty, and that the determination of such company's income and excess-

profits tax liabilities for the year ended June 30, 1938, discloses deficiencies in the respective amounts of $1,875.48 and $1,098.88 as shown by the attached statement, which deficiencies and penalties plus interest [44] as provided by law, it is proposed to assess against you as transferee of the assets of said corporation, in accordance with the provisions of Section 311 of the Revenue Act of 1936."

The petitioners appealed to this Board for the redetermination of such tax liabilities in Docket Nos. 99161, 99256, 99257 and 99259, respectively. These cases came on for hearing before a Member of the Board at Portland, Oregon, on November 29, 1939. Ivan F. Phipps, Esq., and Carl E. Davidson, Esq., appeared for the petitioners in the case of Central Holding Co., Docket No. 99258, and in the cases of James L. Conley, Transferee, Docket No. 99259, E. W. Barnes, Transferee, Docket No. 99256, and Olive G. Barnes, Docket No. 99257. S. J. Bischoff, Esq., appeared for petitioner Robert T. Jacob, Transferee. T. M. Mather, Esq., and Alva C. Baird, Esq., appeared for the respondent in all of the cases. All of the cases were heard together and pursuant to order of the Board the cases of the transferees were consolidated for hearing. On the second day of the hearings, November 30, 1939, the transcript of record reads in part as follows:

"Mr. Davidson: May it please your Honor, in the case of Central Holding Company, as a result of conversations between counsel and

some adjustments in the tax liability as a result of disclosures yesterday where capital amounts and loans were erroneously included in income, while the petitioner in this case does not wish to admit the fraud penalty, however, for the purpose of closing the case, it has been agreed between counsel for the respondent and counsel for the petitioner that the Board may enter its decision that there is a deficiency in income tax for the year ended June 30, 1937, in the sum of $2,528.72; that there is a deficiency in excess profits tax for the fiscal year ended June 30, 1937, in the sum of $881.62; that there may be asserted a 50% penalty in the amount of $1,264.36 upon the deficiency in income tax for that year, and a 50% penalty in the amount of $440.81 on the defiiciency in excess profits taxes for that year.

"It is further stipulated between the parties that there is a deficiency for the fiscal year ended June 30, 1938, which is also before the Board, in the sum of $1,875.48 in income taxes, and of $1,098.88 in excess profits taxes.

"The Member: Does the government stipulate that the case may be disposed of by the entry of a decision to that effect?

"Mr. Mather: Just one moment, your Honor. That is correct, your Honor.

"The Member: Mr. Bischoff?

"Mr. Bischoff: In the case of Robert T. Jacob, Docket No. 99161, the petitioner, as a result of the same conference that was referred

to by counsel, and since the transferor has stipulated that a deficiency may be determined in the amount just set forth for taxes and penalties, and since your Honor has ruled that the [45] transferees are precluded from challenging the transferor's liability, pursuant to the stipulation of the transferor, the petitioner, Robert T. Jacob, while denying the amount of deficiency and the liability for penalty of the transferor, admits that he is transferee, and the decision may be entered against him in the amount set forth in the statement of counsel for the taxpayer.

"The Member: What is the situation with regard to the other transferees? Of course, the transferees are jointly and severally liable.

"Mr. Davidson: In the case of E. W. Barnes, Transferee, Olive G. Barnes, Transferee, and James L. Conley, Transferee, Docket Numbers 99256, 99257, and 99259, while the transferees do not admit the fraud penalty, inasmuch as it is admitted that a penalty may be entered in the transferor's case, they are foreclosed from contesting that, and they do admit they are transferees, and they consent that the Board may enter its decision in finding a liability for the amount of the deficiency assessed against the transferor in the Central Holding Company case.

"The Member: Do I understand that the transferee is admitting any interest that may be due?

"Mr. Davidson: The deficiency would necessarily carry the interest.

"The Member: That disposes of this group of cases entirely?

"Mr. Mather: That is my understanding.

"The Member: The Board will enter a decision in accordance with the deficiencies which have been read into the record."

Pursuant to the stipulations made by the parties at open hearings the Board entered a decision in each of the transferee proceedings reading as follows:

"Pursuant to the stipulation of deficiencies of the parties in the above-entitled proceeding read into the record at the hearing on November 30, 1939, it is—

"Ordered and Decided that the petitioner is liable as a transferee of the assets of the Central Holding Co. for deficiencies in income and excess-profits taxes due from that company for the fiscal year ended June 30, 1937 (including 50 percent additions thereto) of $3,793.08 and $1,322.43, respectively; and for the fiscal year ended June 30, 1938, of $1,875.48 and $1,098.88 income and excess-profits taxes, respectively."

[46]

The decision entered did not provide for the collection of interest upon the amounts of deficiencies although the Board is of the opinion that there is no question but that the stipulation of the parties provided for the collection of interest upon the

stipulated deficiencies. The transcript of record above quoted contained the following:

> "The Member: Do I understand that the transferee is admitting any interest that may be due?
>
> "Mr. Davidson: The deficiency would necessarily carry the interest."

Davidson spoke for all of the interested parties. S. J. Bischoff, who alone represented Robert T. Jacob, remained silent. His silence was the equivalent of consent. There should have been added to the last sentence of the decisions as written "together with interest as provided by law."

It was unquestionably the intention of all parties concerned that the stipulations made before the Board entirely disposed of the cases. The issues before the Board in the case of Central Holding Co., the transferor, was the amount of the deficiency in tax for the fiscal years ended June 30, 1937, and June 30, 1938. The respondent has made no motion for a revision of the decision of the Board entered in the case of Central Holding Co., Docket No. 99258.

The question in issue in the transferee cases was simply the liability of the transferees for the deficiencies in tax, with interest, due from the Central Holding Co. in Docket No. 99258. No question was before the Board as to the liability of the transferees for taxes which had theretofore been assessed against the Central Holding Co. for the

fiscal years ended June 30, 1937, and June 30, 1938, which had not been collected.

These liabilities were not involved in the pleadings. The Government was making no contention that the transferees were liable for the unpaid assessed taxes. They could not have been taken cognizance of by the Board on the pleadings before it. The only way that they could be brought into the picture would be by a motion to amend the answer, or by a motion for the filing of an amended answer. At the time of the hearings no such motion was made. The motion for the filing of an amended answer was not filed until March 27, 1940. It was untimely.

It is the function of the Board to sit as an arbiter of questions in issue between the respondent and the taxpayer. Stipulations settling litigation are always favored by the courts and by the Board. There should be an end to litigation.

Although it has been held in some cases that the decision of a court made pursuant to a stipulation may be modified or amended for the purpose of making the court's judgment conform to the stipulation of the parties and for the purpose of correcting mutual mistakes of fact, the court or the Board should not lend itself to a modification of its judgment or decision for the purpose of enabling one party over the objection of the other [47] to sweep away the stipulations made in open court.

In 60 Corpus Juris 781, it is said: "In the absence of fraud, mistake, or imposition, stipulations

admitting or agreeing on the existence of designated facts for the purpose of trial are binding conclusively upon the parties as to the facts so designated, as long as the stipulations stand; and on the court as well as on the parties.

In Silverman v. Bermuda & West Indies S. S. Co., Ltd., 12 Fed. Supp. 164, 168, it was pointed out (citing 179 N. Y. 473, at page 482): "A stipulation made by the parties or their attorneys * * * stands in the case for all purposes until 'litigation is ended, unless the court upon application shall relieve either or both of the parties from its operation.' "

It was clearly the intention of the attorneys representing the transferees and Government counsel to enter into stipulations which should cover the liabilities of the petitioners as transferees of the assets of Central Holding Co. only in so far as the deficiencies concerned in Docket No. 99258 were involved. No other liabilities were in issue. The Board accepted the stipulations of the parties. Decisions will be entered carrying into effect the stipulations made. Respondent's motions will be denied. Enter:

Entered Apr. 9, 1940. [48]

[Title of Board and Cause.]

DECISION

Pursuant to the stipulation of the parties in the above-entitled proceeding read into the record on November 30, 1939, it is—

Ordered and Decided that the petitioner is liable as a transferee of the assets of the Central Holding Co. for deficiencies in income and excess-profits taxes due from that company for the fiscal year ended June 30, 1937 (including 50 percent addition thereto), of $3,793.08 and $1,322.43, respectively, with interest as provided by law, and for the fiscal year ended June 30, 1938, of $1,875.48 and $1,098.48 income and excess-profits taxes, respectively, together with interest as provided by law.

(Signed) CHARLES P. SMITH
Member.

Enter:

Entered Apr. 10, 1940.

CPS:aa. [49]

EXHIBIT F

United States Board of Tax Appeals
Washington

Docket Nos. 99161
99256
99257
99259

ROBERT T. JACOB (Alleged Transferee), E. W. BARNES, Transferee, OLIVE G. BARNES and JAMES L. CONLEY,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER DENYING RESPONDENT'S MOTION

Counsel for the respondent has now on May 7, 1940, filed a motion and brief in support thereof praying: (a) That an order be entered by the Chairman directing that the report of the division entered in each of the above entitled proceedings, on April 9, 1940, be reviewed by the Board; (b) That the orders and decisions entered by said division in each of said proceedings, on April 9, 1940, and April 10, 1940, be vacated and set aside; (c) That an order be entered by the Board relieving the respondent and the Government of the United States of the inadvertent and oppressive oral stipulations entered into by counsel for respondent in respect of these transferee proceedings, on November 30, 1939; (d) That a new trial for rehearing be

granted and ordered; and (e) That said transferee proceedings be restored to the Circuit Calendar for hearing, in due course, at or in the vicinity of Portland.

Much of the argument made in support of the present motion was presented in a previous motion and was considered when the report and orders of Division No. 5 (Smith), entered on April 9 and 10, 1940, were prepared. The purpose of the motions is to secure relief from stipulations entered into between counsel for the parties which stipulations settled the several proceedings. The ground for the motions is that counsel for the respondent was not aware, at the time of stipulating, of the fact that certain taxes of Central Holding Company, transferor, were unpaid.

It appears that the counsel could have been informed of all the facts by the exercise of due diligence, and that counsel for the respondent was not misled or misinformed by the petitioners. In these circumstances the proper exercise of our discretion is to require the parties to abide by their stipulation.

Accordingly, it is hereby

Ordered that the motion of counsel for the respondent, filed on May 7, 1940, be and hereby is Denied.

(Signed) C. R. ARUNDELL
Chairman.

Dated: May 9, 1940.

[Endorsed]: U. S. B. T. A. Filed July 2, 1941.

[50]

United States Board of Tax Appeals

Docket No. 108032

AGNES C. JACOB (Alleged Transferee),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

## ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition. Alleges that the total amount of the income and excess-profits taxes determined by respondent as assessable against the Central Holding Company was and is in excess of the total amount as alleged in paragraph 3 of the petition.

4. Denies that the respondent erred in his [51] determination of the transferee liability of the petitioner as shown by the notice of deficiency and of transferee liability from which petitioner's appeal is taken. Specifically denies that he erred in

the manner and form as alleged in subparagraphs (a) to (h), inclusive, of paragraph 4 of the petition.

5(a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

5(c). Admits that the said corporation was organized with capital stock consisting of 300 shares of no par value; that upon the formation of the corporation 100 shares of the capital stock of said corporation were subscribed for and issued to Robert T. Jacob; denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Admits the allegations contained in subparagraph (d) of paragraph 5 of the petition.

5(e). Admits that on July 15, 1937, the Welcome Hotel Building and contents were destroyed by fire; denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition.

5(f) to (k), inclusive. Denies the allegations contained in subparagraphs (f) to (k), inclusive, of paragraph 5 of the petition.

5(l). Admits that the Commisisoner of Internal Revenue sent to Robert T. Jacob, transferee, a notice of deficiency of tax of the Central Holding Company. Denies the remaining [52] allegations contained in subparagraph (l) of paragraph 5 of the petition.

5(m) to (p), inclusive. Denies the allegations contained in subparagraphs (m) to (p), inclusive, of paragraph 5 of the petition.

5(q). Admits that at or about the time that Robert T. Jacob subscribed for the shares of capital stock, as aforesaid, Robert T. Jacob promised to make a gift of said capital stock to the petitioner, who is the wife of the said Robert T. Jacob, and to Shirley May Jacob, Beverly Jean Jacob, and Gwendolyn E. Jacob, daughters of Robert T. Jacob, in equal shares. Denies the remaining material allegations contained in subparagraph (q) of paragraph 5 of the petition.

6. Denies generally and specifically each and every material allegation in the petition herein not hereinbefore specifically admitted, qualified or denied.

7. Further answering the petition herein the respondent alleges as follows:

(a). That on, to-wit: September 15, 1938, the Central Holding Company, an Oregon corporation, filed with the Collector of Internal Revenue for the District of Oregon, its corporation income and excess-profits tax return for the fiscal year ended June 30, 1938, disclosing thereon income tax and excess-profits tax liabilities in the respective [53] amounts of, to-wit: $3,163.80 and $2,844.02; that on or about, to-wit: September 15, 1938, said amounts of, to-wit: $3,163.80 and $2,844.02, representing the amounts of income tax and excess-profits tax liabilities reported on the return of the Central Holding Company to be due for the fiscal year ended June 30, 1938, as aforesaid, were duly assessed against said Central Holding Company, in

accordance with law in such cases made and provided.

(b). That although payment of the amounts of the income tax and excess-profits tax liability of, to-wit, $3,163.80 and $2,844.02, reported to be due by and on the return as filed by the Central Holding Company for the fiscal year ended June 30, 1938, as aforesaid, has been duly demanded by respondent in accordance with law in such case made and provided, together with interest thereon as provided by law, the said Central Holding Company has refused and still refuses to pay the same.

(c). That on, to-wit: March 3, 1939, there were assessed by respondent against the Central Holding Company, an Oregon corporation, as aforesaid, in accordance with law in such case made and provided, deficiencies in respect of the income tax and excess-profits tax in the respective amounts of, to-wit: $1,875.48 and $1,098.88, determined by him, the respondent, to be due and owing by said Central Holding Company for its taxable fiscal year ended June 30, 1938. [54]

(d). That although payment of the deficiencies in income tax and excess-profits tax as assessed against said Central Holding Company, as aforesaid, has been duly demanded by respondent, in accordance with law in such case made and provided, together with interest thereon as provided by law, the said Central Holding Company has refused and still refuses to pay the same.

(e). That on or about, to-wit: August 17, 1937, the only assets or property of value owned by said

Central Holding Company consisted of, to-wit: Cash in the amount of, to-wit: $58,466.30, and certain real and personal property situate at Hines, Oregon, of a then value of, to-wit: $2,800.

(f). That on or about, to-wit: August 17, 1937, the said Central Holding Company became a liquidated corporation and has since so remained, by reason of the fact that on that date, to-wit: August 17, 1937, the said Central Holding Company distributed to and among its stockholders, according to their respective stock interests in said company, all and every of its assets and properties of value of whatever kind and nature whatsoever; that the assets and properties so distributed by said Central Holding Company to and among its stockholders, as aforesaid, consisted of cash in the amount of, to-wit: $58,466.30 and certain real and personal property situate at Hines, Oregon, of a value, as at the [55] time of such distribution and liquidation, as aforesaid, of, to-wit: $2,800.

(g). That no part of the aforesaid amounts of income tax and excess-profits tax of, to-wit: $3,163.80 and $2,844.02, respectively, reported to be due by and on the return as filed by the Central Holding Company for the fiscal year ended June 30, 1938, as aforesaid, has been paid, and said amounts now remain due and unpaid.

(h). That no part of the deficiencies in income tax and excess-profits tax, determined by respondent to be due from and assessed against the Central Holding Company, as aforesaid, in the re-

spective amounts of, to-wit: $1,875.48 and $1,098.88, has been paid, and said amounts now remain due and unpaid.

(i). That by reason of the liquidation and distribution by said Central Holding Company of its assets and properties to and among its stockholders, as aforesaid, said Central Holding Company became and now is insolvent and is without assets or property of any kind or value whatsoever with which to pay the income tax and excess-profits tax reported on its return to be due for the fiscal year ended June 30, 1938, as aforesaid, or the deficiencies in income tax and excess-profits tax determined to be due from and assessed against the Central Holding Company, as aforesaid, or out of or against which the respondent, on behalf of the United States, may proceed for the purpose of collecting either the amounts [56] of income tax and excess-profits tax so reported on its return to be due by the Central Holding Company for the fiscal year ended June 30, 1938, as aforesaid, or the deficiencies in income tax and excess-profits tax determined to be due from and assessed by respondent against the Central Holding Company for said fiscal year, as aforesaid, all in the aggregate amount of, to-wit: $8,982.18, together with interest thereon as provided by law.

(j). That as at the time of the liquidation of and distribution by said Central Holding Company of its assets and properties to and among its stockholders on, to-wit: August 17, 1937, as aforesaid, the pe-

titioner herein was a stockholder in the said Central Holding Company; that as such stockholder, and without consideration, there were distributed by said Central Holding Company to the petitioner on, to-wit: August 17, 1937, assets or property, consisting of cash in the amount of, to-wit: $4,901.30; that, in the alternative, as such stockholder, and without consideration, there were distributed by said Central Holding Company to the petitioner on, to-wit: August 17, 1937, other assets or property of a then fair market value of, to-wit: $4,901.30.

(k). That, in the alternative, as at the time of the liquidation of and distribution by said Central Holding Company of its assets and properties to and among its stockholders, to-wit: August 17, 1937, as aforesaid, the [57] petitioner's husband, Robert T. Jacob, was a stockholder in the said Central Holding Company; that as such stockholder, and without consideration, there were distributed by said Central Holding Company to the said Robert T. Jacob on, to-wit: August 17, 1937, assets or property consisting of cash in the amount of, to-wit: $20,422.10; that in the alternative, as such stockholder, and without consideration, there were distributed by said Central Holding Company to said Robert T. Jacob on, to-wit: August 17, 1937, other assets or property of a then fair market value of, to-wit: $20,422.10; that on some date unknown to respondent, but believed by him to be on or about, to-wit: August 17, 1937, the said Robert T. Jacob, without consideration, made a gift or otherwise

transferred to the petitioner, out of the funds distributed to him by said Central Holding Company, as aforesaid, of the amount of, to-wit: $4,901.30 in cash; that, in the alternative, on some date unknown to respondent, but believed by him to be on or about, to-wit: August 17, 1937, the said Robert T. Jacob, without consideration, made a gift or otherwise transferred to petitioner, out of the assets or property distributed to him by the Central Holding Company, as aforesaid, assets or property of a then fair market value of, to-wit: $4,901.30.

(1). That by reason of the premises the petitioner became and now is liable as a transferee or as a transferee of a transferee of the property of the Central Holding [58] Company, for and on account of the unpaid income tax and excess-profits tax now due and owing by said Central Holding Company for the fiscal year ended June 30, 1938, to the extent and in the amount of, to-wit: $4,901.30, together with interest thereon as provided by law.

Wherefore, it is prayed that the Board may hear the proceeding and determine and hold: (1) that there are due and owing by the Central Holding Company, now a liquidated Oregon corporation, income and excess-profits in the respective amounts of, to-wit: $3,163.80 and $2,844.02, reported by said Central Holding Company on its return for the fiscal year ended June 30, 1938, to be due for that year as aforesaid; (2) that there are due and owing by said Central Holding Company, now a liquidated Oregon corporation, deficiencies in income tax and

excess-profits tax for said fiscal year ended June 30, 1938, in the amounts, respectively, of, to-wit: $1,875.48 and $1,098.88; (3) that petitioner is liable, as a transferee or as a transferee of a transferee of the property of the taxpayer, the Central Holding Company, for the income tax and excess-profits tax, including the deficiencies, as aforesaid, due and owing by said taxpayer for the fiscal year ended June 30, 1938, in the aggregate amount of, to-wit: $8,982.18, to the extent and in the amount of, to-wit: $4,901.30, together with interest thereon as provided by law; and (4) that respondent is entitled to [59] such other and additional relief as to the Board may seem fit and proper.

(Signed) J. P. WENCHEL, JHP
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
Division Counsel;
JOHN H. PIGG,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed Aug. 20, 1941. [60]

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[Title of Board and Cause.]

## REPLY

Comes now the petitioner above named and for reply to the further answer of the respondent admits, denies and alleges as follows:

1. Admits the allegations set forth in the paragraph 7 (a) of the said affirmative answer.

2. Denies that she has any knowledge or information as to any of the allegations set forth in paragraph 7 (b) of the affirmative answer sufficient to form a belief thereof.

3. Denies the allegations set forth in the paragraph of the affirmative answer numbered 7 (c).

4. Denies that she has any knowledge or information as to the allegations set forth in the paragraph of the affirmative answer numbered 7 (d).

5. Denies the allegations set forth in the paragraphs of the affirmative answer numbered respectively 7 (e), 7 (f), 7 (g), 7 (h), 7 (i), 7 (j) and 7 (l).

6. Admits that Robert T. Jacob, petitioner's husband, was a stockholder of the Central Holding Company, and except as herein specifically [61] admitted, denies each and every of the allegations set forth in the paragraph of the affirmative answer numbered 7 (k).

Wherefore, petitioner prays for judgment as demanded in the petition.

.....

Attorney for Petitioner.

(s) S. J. BISCHOFF,

1116 Public Service Building,

Portland, Oregon.

[Endorsed]: U.S.B.T.A. Filed Sept. 24, 1941.

[62]

United States Board of Tax Appeals

Docket Nos. 108032, 108033, 108034, 108035.
Promulgated July 23, 1942.

AGNES C. JACOB (Alleged Transferee),
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SHIRLEY MAY JACOB (Alleged Transferee),
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BEVERLY JEAN JACOB (Alleged Transferee),
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

GWENDOLYN E. JACOB (Alleged Transferee),
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

FINDINGS OF FACT AND OPINION

In 1936 Jacob with Conley and Barnes acquired a certain hotel property and transferred it to a newly organized corporation, each receiving one-

third of the capital stock. Jacob had advised petitioners, his wife and daughters, that he was going to give them part of the stock to be received by him, but because of an agreement with a creditor of the corporation to hold control until the debt was paid, he could not immediately transfer the shares to them. The hotel burned and the debt was paid from the fire insurance. Immediately upon payment of the debt, Jacob had 99 of his 100 shares of stock issued in the names of the petitioners, after which the net insurance proceeds were distributed in equal parts between the Conley, Barnes, and Jacob stock, leaving the corporation insolvent. Respondent determined a deficiency against the corporation and transferee liability therefor against Jacob, Barnes, and Conley, who filed petitions with the Board contesting such liability. The proceedings were settled by agreement and pursuant to the agreement decisions for the deficiency were entered against the three petitioners as transferees. It was later developed that the corporation had failed to pay the income tax shown on its return and the respondent determined that these petitioners were the owners of 99 shares of the Jacob stock at the time the insurance proceeds were distributed and were liable as transferees for the unpaid tax. Petitioners were the owners of the 99 shares at the time of the distribution of the net insurance proceeds and Jacob, acting for them, received their respective shares of the money distributed. Held, that the respondent is not estopped to assert transferee liability against the petition-

ers and that the prior proceeding in which Jacob sought to litigate his individual liability as transferee is not res judicata in these proceedings; held, further, that the petitioners are liable as transferees of the corporation to the extent of their respective shares in the amounts received by Jacob for them.

S. J. Bischoff, Esq.,
for the petitioners.
John Pigg, Esq.,
for the respondent.

The Central Holding Co. filed an income and excess profits tax return for the fiscal year ended June 30, 1938, showing liability for income tax and excess profits tax in the respective amounts of $3,163.80 and $2,844.02, or a total of $6,007.82. No part of either the income tax or the excess profits tax so reported has ever been paid. The respondent has determined that the petitioners were transferees of assets of the Central Holding Co. and proposes to assess against them as such transferees the following indicated amounts, plus interest as provided by law:

| | Docket No. | Amount |
|---|---|---|
| Agnes C. Jacob | 108032 | $4,901.30 |
| Shirley May Jacob | 108033 | 5,105.52 |
| Beverly Jean Jacob | 108034 | 5,105.52 |
| Gwendolyn E. Jacob | 108035 | 5,105.52 |

## FINDINGS OF FACT

The petitioners are residents of Portland, Oregon. Petitioner Agnes C. Jacob is the wife of Robert T. Jacob and the other three petitioners are

their daughters. Gwendolyn E. Jacob was born on August 28, 1917, Shirley May Jacob on October 10, 1918, and Beverly Jean Jacob about 1923. From about 1921 until 1926 Robert T. Jacob was employed in the office of the collector of internal revenue at Portland, Oregon. Upon his admission to the bar in 1926 he began the practice of law in Portland, where he has since continued to practice. Since his admission to the bar he has devoted a considerable portion of his time to handling income tax matters before the Bureau of Internal Revenue, the Board of Tax Appeals, and the Federal courts and holds himself out as an expert in Federal income tax law. In 1936 and for some undisclosed period thereafter Jacob had an office-sharing arrangement with James L. Conley, another attorney. Conley is not experienced in and does not engage in the practice of income tax law.

In June 1936 E. W. Barnes, a client of Conley, held a contract for the purchase of a hotel property known as the Welcome Hotel, which property consisted of land, buildings, furniture, fixtures, and equipment located in Burns, Harney County, Oregon, about 330 miles from Portland. Under the contract Barnes could acquire the hotel property on the payment of $18,000 in cash, it being understood, however, that the property was to pass with approximately $22,000 in state, county, [64] and city taxes, both real and personal, standing against it. Barnes was unable to finance the purchase of the property and at the suggestion of Conley took

up the matter with Jacob, who arranged with one of his clients, named Farrell, for a loan of $15,000. Barnes, Conley, and Jacob agreed that they would advance $1,000 each; that they would organize a corporation to take title to and operate the property; and that each of them would receive one-third of the stock of the corporation. The corporation, known as the Central Holding Co., was organized under the laws of Oregon on June 20, 1936. Farrell made the loan of $15,000 as agreed, taking a mortgage on the property as security, and Conley and Barnes borrowed $3,000 from Jacob to be applied on the purchase price of the property, it being agreed between them that, since Jacob had been instrumental in obtaining the $15,000 from Farrell, Conley and Barnes should contribute the $1,000 he was to pay under the original agreement. The loan of $3,000 was subsequently repaid to Jacob by Barnes and Conley.

The Central Holding Co., sometimes referred to as Central, took title to the hotel property and on July 1, 1936, began its operations. Upon formation of Central, Barnes became president and manager of the hotel. Conley was vice president. He prepared the corporate minutes, kept the stock records, and handled the corporation's legal affairs. Jacob was secretary-treasurer and his duties were to keep the corporation's books of account, except such as were kept at Burns under Barnes' supervision, prepare the corporation's income tax returns, and handle its tax matters.

Central was organized with a capital stock con-

sisting of 300 shares of no par value common stock. One of the conditions upon which Farrell made the loan of $15,000 was that control of the corporation should be vested in Jacob until the loan was paid. Accordingly at the time of organization a certificate for 100 shares of stock was issued to Jacob; certificates for one share, 26½ shares, and 72½ shares, respectively, were issued to Barnes, and certificates for 26½ shares and 73½ shares, respectively, were issued to Conley; and Conley and Barnes thereupon endorsed their certificates for 26½ shares each and gave them to Jacob, to be returned to them after Farrell had been paid. Barnes endorsed his certificate for 72½ shares to his wife, Olive G. Barnes, and it was placed in Conley's safe, no transfer of the stock being made at that time on the books of the corporation. A few months later, however, the transfer was made on the books and a certificate issued to Mrs. Barnes.

Barnes was the active manager of the hotel at Burns throughout the time it was operated by Central. Because of complaints by Jacob as to Barnes' management, one complaint being that Barnes was extravagant, friction and unpleasantness developed between them. [65]

Central continued to operate the hotel until July 15, 1937, when the main building, together with all of its contents, was destroyed by fire. The boiler room with an apartment above was all that was not destroyed. At the time of the fire Central was carrying fire insurance on the property as follows: $54,000 on the building with Lloyd's of London,

$5,000 on the furniture with United Fireman, and $5,000 on the furniture and $8,000 on the building with the Lumberman's Underwriter's Association, or a total of $72,000 on the building and furniture.

Upon learning that the hotel was burning Conley advised Jacob and they had a brief discussion as to the probable future course of the corporation in event there should be a complete destruction by the fire. Jacob expressed the desire, in the event of complete destruction, to discontinue his connection with the corporation. On the second day after the fire Conley went to Burns and Barnes asked him what he and Jacob thought about rebuilding. Conley replied that Jacob wanted "to take his money and get out" but that he, Conley, would join in rebuilding if they could do so without going very heavily into debt. After some discussion Barnes asked that Jacob and Conley give him their stock in the event they did not desire to continue. Conley replied that he was agreeable to the proposal and would submit the matter to Jacob upon his return to Portland. When advised of Barnes' request Jacob also assented to the proposal. Barnes regarded the corporation as more or less of a nuisance but desired to continue its existence because of his belief that corporate financing would be easier than personal financing in the event he should be able to continue in the hotel business.

A few days after Conley's return from Burns Barnes came to Portland. He wanted to rebuild the hotel, but Conley and Jacob told him that they had decided against participation in such a plan. As

a consequence it was decided to distribute the corporation's assets, Conley and Jacob agreeing that they would give their stock in the corporation to Barnes for whatever use he might thereafter care to make of the corporation.

By the time of the fire Central had reduced the state, county, and city taxes standing against its property from $22,000 to $16,000 or $17,000 and the loan from Farrell had also been greatly reduced.

By August 12, 1937, the proceeds of the three insurance policies totaling $18,000 had been collected and all debts or liabilities of Central, exclusive of state, county, and city taxes, and its Federal income tax, had been paid. The balance due Farrell had been paid prior to the end of July, either from the insurance proceeds or from a bank loan which in turn was paid from the insurance proceeds. After payment of the above items a balance of $7,266.32 remained [66] and it was decided that this balance should be distributed to the stockholders. Division of this balance into three parts indicated that each group of stockholders was entitled to $2,422.10. Five thousand dollars had been sent to a bank at Burns, from which Barnes had paid some small debts of Central ($204.07 to Conley in cash and a note in the amount of $1,384.08 owing by Conley to the bank) and had transferred $3,000 to his personal account. Some $2,600 or $2,700 had been turned over to Jacob. Since both Barnes and Jacob had received cash in excess of the amount allocable to the stock represented by them, payments were made

by them to Conley in amounts sufficient to equalize the three parts at $2,422.10. This was accomplished at a meeting of the three on August 12, 1937, at which time each of them signed a receipt to Central showing that $2,422.10, being one-third of the above net proceeds of insurance, had been received. The receipts signed by Conley and Barnes were signed, "Jas. L. Conley" and "E. W. Barnes", respectively, while the receipt signed by Jacob was signed as follows:

R. T. Jacob
for Agnes C. Jacob
Gwen Jacob
Shirley Jacob
Beverly Jacob

A few days after the above settlement $54,000, being the amount due under the insurance policy with Lloyd's of London, was received and on August 17, 1937, Barnes, Conley, and Jacob met at the First National Bank in Portland and divided the sum so received, each one receiving $18,000. In connection with this distribution no receipts were signed. After this second distribution Central was left with no property or assets except the property upon which the hotel at Burns had stood. The value of that property was not in excess of $10,000, while state, county, and city taxes were outstanding against it to the extent of $16,000 or $17,000. The property was later lost to the county in delinquent tax proceedings. As a result of the distribution of the insurance proceeds Central was rendered insolvent and unable to pay its debts.

At or about the time Central was organized and the hotel at Burns was acquired, Jacob showed a picture of the hotel to his wife, Agnes C. Jacob, and his daughters, the other petitioners herein, and told them he was going to give each of them a portion of the stock received by him in the corporation. Shortly after Central was organized he reiterated that promise and took his wife to Burns to see the hotel where they stayed for several days. When the stock of Central was issued, Jacob did not have any of the stock coming to him issued in the names of his wife and daughters but had the entire 100 shares [67] issued in his name. His reason for not having the stock issued to the petitioners at that time was that he had promised Farrell that he would retain control of the corporation until Farrell had been repaid by Central. The 100 shares issued in his name, plus the 26½ shares each issued in the names of Barnes and Conley and by them endorsed and delivered to Jacob, constituted 51 percent of Central's outstanding stock. As soon as the Farrell loan was paid in July 1937, Jacob returned to Barnes and Conley the certificates received from them as indicated. At the same time or shortly thereafter Jacob had the 100 shares of stock standing in his name reissued in five different certificates—one share to himself, 24 shares to his wife, Agnes C. Jacob, and 25 shares each to his three daughters. At the time these certificates were issued his wife and daughters were at the beach. He mailed the certificates to his wife, requesting

that they be endorsed and returned to him. She knew that the certificates received were related to "The Welcome Hotel" and were the shares of stock that Jacob had promised to give to her and their daughters. The shares were endorsed as requested and returned to Jacob within a few days. At no time after the issuance of the 100 shares of Central stock in his name did Jacob consider that he was the beneficial owner thereof but at all times considered that his wife and daughters were the beneficial owners. At the time the fire insurance proceeds were distributed by Central the Jacob stock was owned one share by Jacob, 24 shares by his wife, and 25 shares each by the three daughters.

Jacob retained the certificates endorsed by the petitioners as set forth above in his possession until final distribution of the insurance proceeds on August 17, 1937, after which on either the same day or the day following they were given by him to Barnes. At or about the same time Conley gave his certificates to Barnes and he and Jacob submitted their resignations as directors and officers of Central.

Shortly after the burning of the hotel at Burns, Barnes acquired six lots in Hines, Oregon, on which stood a partially constructed building known as the Hines Hotel. The property had been acquired by Harney County for nonpayment of taxes and was sold to Barnes for $2,809.27. Barnes took title to the property in his own name, receiving two deeds—one dated August 4, 1937, from the county judge and commissioners of Harney County and

the other a quitclaim deed dated July 24, 1937, from the Pondosa Investment Co., former owner of the property. By quitclaim deed also dated August 4, 1937, Barnes conveyed the property to his wife, Olive G. Barnes. The $2,809.27 used by Barnes in making the purchase was part of the $3,000 received by him in the first distribution of insurance proceeds by Central and was covered by the settlement between Jacob, Conley, and Barnes on August 12, 1937. [68]

On November 29, 1937, Barnes and his wife conveyed the Hines Hotel property and certain other lots located in Hines to Central. About the same time Barnes negotiated the purchase of a hotel in Arlington, Gilliam County, Oregon, the purchase to be made in the name of Central. The purchase price was stated at $50,000 and was to be paid by a purchase money mortgage for approximately $24,000, the assumption of accrued taxes of approximately $5,000, the conveyance of the Hines Hotel property and some of the additional lots at $15,000, and the remainder in cash. The $15,000 at which the Hines Hotel property and lots at Hines were included was greatly in excess of their actual value. The cash consideration was paid by Barnes and represented a portion of the insurance proceeds received by him from Central on August 17, 1937. While title to the Arlington property was taken in the name of Central under a deed of conveyance dated December 15, 1937, Barnes had requested Conley, who had represented him in the transaction, to have the property transferred to him be-

fore the end of 1937. Conley did not carry out the instructions immediately, however, and the property continued to stand in the name of Central until the September of 1938, when it was conveyed to Barnes or his wife or to both of them.

Central was dissolved on January 6, 1941, by proclamation of the Governor of Oregon and its articles of incorporation were revoked because of its failure for two consecutive years preceding that date to file the statements or pay the license fees required by law.

For the calendar year 1937 Jacob prepared income tax returns for each of his three daughters. On each of the returns was shown a net income of $3,958.43 and a tax liability of $106.34. No deductions were shown on the returns and the only item of income on each was shown as having resulted from a sale or exchange in August 1937 of 25 shares of stock in Central, acquired in June 1936. The basis for the stock was shown at $157.48 and the amount received at $5,105.52. Only 80 percent of the gain was shown as taxable, on the ground that the stock had been held for more than one year but not over two years. Jacob also prepared the income tax return of Mrs. Jacob for 1937, on which was shown a net income of $4,734.08 and a tax liability of $206.72. Of said income $3,800.10 was shown as having resulted from the sale or exchange in August 1937, of 24 shares of stock in Central, acquired in June 1936 at a cost or other basis of $151.17, 80 percent of the gain being shown as tax-

able for the reason that the stock had been held for over one year but not over two years. At the time their returns were prepared Gwendolyn E. Jacob and Shirley May Jacob were at school in Dallas, Texas, and Jacob sent the returns to them, with instructions that they be executed and returned to him. The returns were signed and sworn [69] to on March 7, 1938, and returned to Jacob as requested. Beverly Jean Jacob executed her return on March 15, 1938, at the request of Mrs. Jacob. The returns for the three daughters were filed with the collector for the district of Oregon on March 15, 1938. Both Jacob and his wife filed their returns for 1937 on April 15, 1938, extensions of time for such filing having been previously obtained. Jacob's return showed a net income of $23,048.11 and a tax liability of $1,975.19. Included in taxable income was an amount of $15,833.75 shown as gain resulting from the sale or exchange on August 8, 1937, of 100 shares of stock in Central, acquired on June 22, 1936. The basis for the stock was shown at $629.91 and the amount received at $20,422.10. Only 80 per cent of the gain was shown as taxable on the ground that the stock had been held for over one year but not over two years. Attached to the return was a statement which reads as follows:

Filed concurrently with this return, which includes all of the profit from disposition of stock of the Central Holding Company, are separate returns of Agnes C. Jacob, Gwendolyn E. Jacob, Shirley May Jacob, and Beverly Jean Jacob, in each of which has also been included proportionate

divisions of the same profits. It is obvious, of course, that the profit is not taxable upon both theories, but this method of reporting the income attributable to the transaction seems to be required by the circumstances. Due to many questions which are presented in connection with gifts, such as motives, date of actual transfer, effectiveness of the gift, etc., there is lack of harmony in the holdings of cases relating to the taxability of the income in such situations, and, if a return were not filed in this manner, and it is ultimately determined that the income is taxable to the undersigned alone, interest would accrue because the tax was not paid upon its due date. On the other hand, if it is determined that the income is taxable to the donees and no returns have been filed, such returns would be delinquent and penalties incurred by reason thereof. Upon completion of payment of the tax, claims for refund will be filed and the rights of the respective claimants thereupon sought to be determined.

The circumstances also seem to require the filing of gift tax returns for the year 1937, although the gifts were in fact purported to have been made in 1936. It was my original purpose to make a division of the shares at the time of the incorporation of the Central Holding Company, but this plan was frustrated in the first instance by conditions imposed by Mr. Robert S. Farrell, who supplied the funds for the purchase of the Welcome Hotel property which gave rise to the profit in question. Mr. Farrell supplied said funds upon the

specific condition that the undersigned retain control of the property thus acquired through the ownership of 51% of the equity therein. This condition is set forth in his letter of May 27, 1936, addressed to me, which reads in part:

> "I will loan you and your associates the sum of $15,000 on the Welcome Hotel at Burns, Oregon, upon the following conditions:
>
> (3) That you own at least 51% of the equity in the property above described."

Notwithstanding the above referred to exactions, shortly after the formation of the Central Holding Company, I informed the members of my family that I was giving them shares of the corporation's stock. [70]

While this promise was made, it should be pointed out that the stock was in fact neither issued nor delivered to the donees until the latter part of July or the early part of August, 1936, at about the time the mortgage to Mr. Farrell was paid. In this connection, it should also be pointed out that while the certificates were issued and delivered at this time, they were dated as of the date of the original date of incorporation. However, stamps covering two transactions, one from myself to the members of my family and from them to Barnes, were affixed to photostatic copies of said certificates retained by me.

The tax liabilities shown on the income tax returns of Jacob, Mrs. Jacob, and the daughters were paid in installments during 1938.

On April 20, 1938, Jacob filed with the collector a gift tax return signed and sworn to by him on April 15, 1938, which return showed no tax liability. In this return he reported the gift to Mrs. Jacob of 24 shares of stock in Central of a value of $4,901.30 and showed love and affection as his motive for making the gift. He also reported the gift to each of his daughters of 25 shares of stock in Central of a value of $5,105.52 and showed "College Educations" as his motive or making the gifts. Attached to the return was an affidavit executed by him on April 15, 1938, which reads as follows:

I Robt. T. Jacob, being first duly sworn, depose and say:

That failure to file the gift tax returns to which this affidavit is affixed within the time required by law, was not due to any intent to evade taxation or to avoid responsibility therefor, but, in accordance with the facts set forth in connection with income tax returns filed concurrently herewith, it is my belief that the gifts were in fact made in 1936. Due to the fact that the stock was purchased in 1936 at a nominal consideration, its value was not sufficient to require the filing of a return in that year, but should I be mistaken in my position, and if the gift was not in fact consummated until 1937, then its value requires the filing of returns on Forms 709-710. Accordingly same are submitted herewith.

No extension of time for filing was requested as affiant was neither sick nor absent.

On April 20, 1938, there were filed with the col-

lector information returns of gifts, prepared by Jacob, for Mrs. Jacob and the daughters. On their returns each daughter reported the gift to her in 1937 of 25 shares of stock in Central of a value of $5,105.52. On her return Mrs. Jacob similarly reported the gift to her of 24 shares of stock in Central of a value of $4,901.30. The returns of Shirley May and Gwendolyn E. Jacob were dated May 23, 1938, while those of Mrs. Jacob and Beverly Jean Jacob were dated March 13, and March 14, 1938, respectively.

In December 1938 a revenue agent made an investigation of the 1937 income tax returns of Jacob, Mrs. Jacob, and the daughters. In his reports he concluded that the gain on the stock in Central was taxable to Jacob and that Mrs. Jacob and the daughters received [71] gifts of the proceeds from the liquidation of Central rather than gifts of stock. As to the daughters, he found that they had no tax liability for 1937 and recommended refunds of the taxes paid by them. As to Mrs. Jacob, he recommended a refund of $173.10 based on the elimination from her income of the gain on Central stock. The refunds thus recommended were made by the Commissioner in 1939.

Upon organization Central adopted a fiscal year ending June 30. Jacob prepared its income tax return for the year ended June 30, 1937. Barnes signed and filed the return with the collector for the district of Oregon on September 15, 1937. The return showed a net income of $3,681.90 and a tax liability of $578.59. For the fiscal year ended June

30, 1938, Barnes had an income tax return prepared for Central and filed it with the collector on September 15, 1938. This return showed a net income of $29,950.20 and a tax liability of $6,007.82. The income reported was shown as gain resulting from the fire which destroyed the hotel on July 15, 1937. Upon an audit of the return for the fiscal year ended June 30, 1937, the respondent determined that the correct net income for the year was $17,768.01, that there was a deficiency in tax of $5,312.50, and that the corporation was liable for the 50 percent penalty in the amount of $2,656.25. As a result of the audit of the return for the fiscal year ended June 30, 1938, the respondent determined that the correct net income was $41,328.53 and that there was a deficiency in tax of $2,974.36. On March 17, 1939, he sent a notice to Central advising it of his determination of the above mentioned deficiencies. Thereafter Central filed a petition with the Board for redetermination of the deficiencies for both years. Also on March 17, 1939, the respondent sent notices to Jacob and Conley and to Barnes and his wife advising them of his determination of the above deficiencies and penalties against Central and advising that he proposed to assess such deficiencies and penalties against them as transferees of Central. Jacob and Conley and Barnes and his wife thereafter filed petitions with the Board alleging error in the respondent's determination.

Jacob filed his petition on June 10, 1939, and assigned errors not only as to the respondent's de-

termination of the deficiencies in tax and penalty against Central, but also as to his determination that Jacob was liable for such deficiencies as a transferee of Central. In this petition which was duly verified before a notary public on June 8, 1939, Jacob alleged that prior to the issuance of any shares of stock in Central he promised to make a gift of the shares to his wife and daughters in equal amounts; that pursuant to the requirements of Farrell respecting his loan he continued to hold the 100 shares of stock issued to him until the loan was repaid; that shortly after the [72] fire, but before repayment of the Farrell loan, he (Jacob), acting on behalf of Mrs. Jacob and the daughters, entered into an agreement with Barnes whereby the latter agreed to purchase the 100 shares of stock which he (Jacob) was holding in trust for Mrs. Jacob and the daughters, at an amount equal to the value thereof as determined by an accounting; that after the payment of the Farrell loan and in pursuance of his agreement to give stock to Mrs. Jacob and the daughters, he (Jacob) surrendered the certificate for 100 shares of stock in Central and caused to be executed and delivered in lieu thereof a certificate for one share to himself, a certificate for 24 shares to Mrs. Jacob, and certificates for 25 shares to each of the daughters; that Barnes had a statement prepared of the accounts of the corporation and he (Jacob) accepted payment for the shares in accordance with the corporation's net worth as shown by such statement, receiving $2,422.10 on or about August 12, 1937, and $18,000

on August 17, 1937; and that at the time of payment of the $18,000 he delivered to Barnes the above mentioned certificates of stock which had been issued to himself, Mrs. Jacob, and the daughters, all of which had been endorsed by the respective owners thereof. In his answer the Commissioner denied the foregoing allegations and among other things affirmatively alleged that at the time of the distribution on August 17, 1937, Jacob was a stockholder in Central and that as such stockholder there was distributed to him on that date, without consideration, cash in the amount of $20,422.10. In his reply Jacob denied the foregoing affirmative allegations of the Commissioner.

All of the above proceedings came on for hearing before the Board on November 29, 1939, at Portland, Oregon, when Carl E. Davidson, Esq., and Ivan F. Phipps, Esq., appeared as counsel for Central, Conley, and Barnes and Mrs. Barnes, S. J. Bischoff, Esq., appeared as counsel for Jacob, and T. M. Mather, Esq., appeared as counsel for the Commissioner. On November 30, 1939, and after the introduction of certain evidence respecting the issue of fraud in the case of Central, but before the production of evidence as to transferee liability of the other parties, the following occurred:

Mr. Davidson: May it please your Honor, in the case of the Central Holding Company, as a result of conversations between counsel and some adjustments in the tax liability as a result of disclosures yesterday where capital amounts and loans were erroneously included in income, while the petitioner

in this case does not wish to admit the fraud penalty, however, for the purpose of closing the case, it has been agreed between counsel for the respondent and counsel for the petitioner that the Board may enter its decision that there is a deficiency in income tax for the year ended June 30, 1937, in the sum of $2,528.72; that there is a deficiency in excess profits tax for the fiscal year ended June 30, 1937, in the sum of $881.62; that there may be asserted a 50% penalty in the amount of $1,264.36 upon the deficiency in income tax for that year, and a 50% penalty in the amount of $440.81 on the deficiency in excess profits taxes for that year. [73]

It is further stipulated between the parties that there is a deficiency for the fiscal year *end* June 30, 1938, which is also before the Board, in the sum of $1,875.48 in income taxes, and of $1,098.88 in excess profits taxes.

The Member: Does the government stipulate that the case may be disposed of by the entry of a decision to that effect?

Mr. Mather: Just one moment, your Honor. That is correct, your Honor.

The Member: Mr. Bischoff?

Mr. Bischoff: In the case of Robert T. Jacob, Docket No. 99161, the petitioner, as a result of the same conference that was referred to by counsel, and since the transferor has stipulated that a deficiency may be determined in the amount just set forth for taxes and penalties, and since your Honor has ruled that the transferees are precluded from challenging the transferor's liability, pursuant to the

stipulation of the transferor, the petitioner, Robert T. Jacob, while denying the amount of deficiency and the liability for penalty of the transferor, admits that he is transferee, and the decision may be entered against him in the amount set forth in the statement of counsel for the taxpayer.

The Member: What is the situation with regard to the other transferees? Of course, the transferees are jointly and severally liable.

Mr. Davidson: In the case of E. W. Barnes, Transferee, Olive G. Barnes ,Transferee, and James L. Conley, Transferee, Docket Numbers 99256, 99257, and 99259, while the transferees do not admit the fraud penalty, inasmuch as it is admitted that a penalty may be entered in the transferor's case, they are foreclosed from contesting that, and they do admit they are transferees, and they consent that the Board may enter its decision in finding a liability for the amount of the deficiency assessed against the transferor in the Central Holding Company case.

The Member: Do I understand that the transferee is admitting any interest that may be due?

Mr. Davidson: The deficiency would necessarily carry the interest.

The Member: That disposes of this group of cases entirely?

Mr. Mather: That is my understanding.

Pursuant to the stipulation in the case of Central the Board on December 5, 1939, entered its decision determining deficiencies and penalties for the fiscal years ended June 30, 1937, and June 30, 1938,

as stipulated. On the same day it entered its decisions in the cases of Jacob, Conley, and Barnes and Mrs. Barnes determining that each of them was liable as a transferee of assets of Central for the deficiencies found against Central but failed to provide in the decisions for interest thereon.

The tax liability of $6,007.82 shown on Central's return for the fiscal year ended June 30, 1938, at the time it was filed, was assessed on October 13, 1938, but no part of it has ever been paid. Notice and demand for the tax was issued by the collector on October 6, 1938, and a second notice and demand was issued on October 18, 1938. On November 9, 1938, a warrant for distraint was issued and on March 7, 1939, lien was filed with the Clerk of the United States District Court at Portland and with the County Clerks of Multnomah County (Portland), Harney County (Burns), and Gilliam County (Condon). Efforts of the collector to collect the tax have been fruitless. [74]

On March 1, 1940, the Commissioner filed with the Board in each of the cases of Jacob, Conley, and Barnes and Mrs. Barnes a motion to vacate the decision entered therein on December 5, 1939, and asking (1) that decisions be entered against each of the parties for transferee liability in an amount equal to the unpaid portion of the original tax shown on the returns of Central for the fiscal years ended June 30, 1937, and June 30, 1938, plus the amounts shown in the Board's decisions entered on December 5, 1939, including penalties and interest as provided by law or in the alternative; (2)

that the Board vacate and hold for naught the decisions entered on December 5, 1939, and place the proceedings on the calendar for further hearing under Rule 50 in order to permit him to offer formal proof as to the actual total amount of the transferee liability of each of the parties for said fiscal years and to make claim therefor to the extent that said total amount of such liability exceeded the amounts shown in his deficiency notices and in the Board's decisions of December 5, 1939; or, as a second alternative, (3) that the Board vacate its decisions of December 5, 1939, and set the proceedings down for hearing de novo. It was stated in the motions that a portion of the original tax shown on Central's return for the year ended June 30, 1937, and the entire amount of $6,007.82 shown on its return for the year ended June 30, 1938, had not been paid, although demand had been made therefor; that Jacob, Conley, and Barnes and Mrs. Barnes, as transferees of assets, were liable for such taxes; that when the stipulations respecting the transferee liability of the parties were entered into counsel for the Comissioner was unaware of the fact that said original taxes had not been paid but that fact was known to said parties; and that counsel for the Commissioner had only recently learned of the nonpayment of the original taxes. On March 4, 1940, the Board vacated its decisions entered on December 5, 1939, in the cases of Jacob, Conley, and Barnes and Mrs. Barnes and ordered the parties to file with the Board briefs in support of or against the Commissioner's motion. Briefs were filed and

at the time the Commissioner filed his brief, on March 27, 1940, he also filed motions for leave to file amended answers. At the time he filed his brief Jacob also filed an affidavit in opposition to the Commissioner's motion to vacate the decisions entered on December 5, 1939. In this affidavit he admitted that at the time of the negotiation and entry of the compromise stipulation of settlement, he and his counsel knew that a portion of the tax shown on Central's return for the year ended June 30, 1937, and all of the tax shown on the return for the year ended June 30, 1938, had not been paid, and stated that no inquiry was made by counsel for the Commissioner as to whether such taxes had been paid, and that he assumed counsel for the Commissioner had knowledge of such fact, and that at the time the compromise [75] stipulation of settlement was negotiated and entered of record there were present at the hearing, among others connected with the Bureau of Internal Revenue, the following persons: J. W. Maloney, collector of internal revenue for the district of Oregon, Walter S. Shanks, chief field deputy in the office of said Collector, and R. P. Kueneke, chief of the income tax department of the collector's office, who had in his immediate possession the records from which the payment or nonpayment of such taxes was ascertainable.

On April 9, 1940, the Board denied the Commissioner's motions filed March 1, and March 27, 1940, and on April 10, 1940, entered its decisions holding that Jacob, Conley, Barnes and Mrs. Barnes each was liable as transferee of assets of Central for the

deficiencies determined in the decision entered in the case of Central on December 5, 1939, together with interest as provided by law. Jacob has paid his total liability as transferee as thus determined by the Board.

On April 8, 1941, the Commissioner sent notices to the petitioners herein, advising them of his proposal to assess against them as transferees of Central the amounts involved herein with respect to the unpaid income and excess profits taxes of Central for the year ended June 30, 1938.

In 1937, Jacob for these petitioners, and without consideration, received from Central the following indicated amounts of assets, leaving it insolvent and unable to pay its debts:

| | |
|---|---|
| Agnes C. Jacob | $4,901.30 |
| Shirley May Jacob | 5,105.52 |
| Beverly Jean Jacob | 5,105.52 |
| Gwendolyn E. Jacob | 5,105.52 |

## OPINION

Turner: But for the lack of coordination on the part of certain of respondent's employees in their efforts to determine and collect the income and excess profits taxes owing by Central, the existence of friction between the stockholders or persons responsible for Central's affairs and the lack of candor on the part of these same individuals in their dealings with each other and with their Government in the matter of Central's tax liability, these proceedings should have been entirely unnecessary. The question in issue is the liability of the petitioners as transferees of Central for the income and excess profits taxes reported by

Central on its return for the fiscal year ended June 30, 1938. That Central was liable for and owed the tax is not disputed and so far as the record shows has never been disputed. The taxes in question resulted in the main from gain realized through the collection of the fire insurance on Central's principal asset, the hotel at Burns. Without making any provision for pay- [76] ment of income and excess profits taxes on the profits so realized, the insurance proceeds were distributed to or for the benefit of the stockholders, leaving Central with no assets except the real estate at Burns, against which stood local taxes far in excess of its value.

The petitioners make a number of contentions: (1) that they never became the owners of the Central stock and furthermore that the stock was sold by Jacob to Barnes and the money received was not received as a distribution by Central but in payment by Barnes for the Jacob stock; (2) that by reason of the prior determination that Jacob, not these petitioners, was the owner of the Central stock, and the subsequent settlement of the transferee proceeding brought by Jacob resulting in entry of decision by the Board to the effect that Jacob was liable as transferee of Central, the respondent made an irrevocable election to treat Jacob as the owner of the Central stock and is now estopped from claiming that the petitioners were the owners thereof and transferees of Central; (3) that if it be held that there was no sale of the stock and the amounts received in respect of such stock were received in liquidation, then Jacob, not the petitioners,

was the transferee, since the amounts received in liquidation were not and have not been physically turned over by Jacob to them; (4) that respondent has failed to show that petitioners are transferees of a transferee of Central; and (5) that he has also failed to show that either Central or Jacob was insolvent at the time of the transfer of the assets as claimed by respondent.

We find no merit in the claim that the stock involved in these proceedings was sold to Barnes and that the money received in connection therewith was not received in liquidation of Central. The facts are that Jacob, whether acting for himself or for the petitioners, with Conley decided not to continue in the hotel business with Central or otherwise. They could see a most attractive cash profit as the result of the fire and decided to take it out. From the insurance proceeds they paid the debt to Farrell and certain other obligations of Central and then distributed the balance in three parts to the stockholders, leaving Central in an insolvent condition. Barnes had no intention or thought of buying either the Conley or Jacobs stock. There was simply a division of the available assets, which in this case happened to be cash. Barnes had some idea that if he might control the corporate shell it might be of some use to him in financing the acquisition of another hotel through the use of a portion or all of the money he had received from Central, but it is perfectly plain that he had no intention that Central should own or conduct any hotel business subsequently acquired by him. It is true

that Barnes did thereafter convey certain properties at Hines, Oregon, to Central and that when the hotel at Arlington was acquired title to that [77] property was taken in the name of Central, but at the time of acquisition Conley was instructed to have title transferred to Barnes within the fifteen days following. It seems that at some point Jacob had advised Barnes and Conley that Central and indirectly its stockholders would be saved some tax on the insurance proceeds through the application of section 112 (f) of Revenue Act 1936, if Barnes should take title, even though temporary, to subsequently acquired properties in the name of Central, and the petitioners apparently take the view that the above acts of Barnes were prompted by the advice of Jacob and constitute evidence that Barnes purchased the Jacob and Conley stock with a portion of the insurance proceeds in some manner withdrawn by him from the corporation, that Barnes' share of the insurance proceeds was not withdrawn but continued as assets of Central, and that the sums received by Jacob and Conley did not therefore constitute distributions by Central to its stockholders. There is some confusion between Jacob, Barnes, and Conley as to the exact character of the advice originally given by Jacob with respect to the Federal income tax liability of Central and as to the exact time when a letter by Jacob quoting section 112 (f), supra, was written and mailed to Barnes. Whatever the facts in that regard, it is apparent that neither Barnes nor Conley understood the advice as Jacob says it was given

and, even though we should accept the Jacob version as to the advice actually given, the understanding of Conley and Barnes clearly negatives the interpretation sought to be placed upon Barnes' acts by the petitioners. Barnes took down a pro rata part of the net insurance proceeds just as Conley and Jacob did. On the evidence we think it perfectly clear that the net insurance proceeds were distributed to or for the Central stockholders and no part thereof may be regarded as having been paid for the Jacob or Conley stock by Barnes.

There are numerous claims in the brief of the petitioners that Jacob, and not the petitioners, was the owner of the Central stock and that the respondent has failed to sustain his burden of proving that the petitioners did own the said stock. Even though it be said that the respondent did have the burden of proving that the petitioners were the owners of the Central stock, and regardless of any evidence that respondent may have offered, it appears that Jacob, the petitioners' witness, has carried that burden for him. Obviously, Jacob knew more than any other person concerning the ownership of the Central shares originally issued in his name, and at no place in his testimony did Jacob ever state that he and not the petitioners were the owners of the stock. To the contrary, he testified in response to questions by counsel for the respondent that he at all times regarded the petitioners as the beneficial owners thereof. He testified [78] that about the time the Welcome Hotel was acquired he advised the petitioners that he was going to

give each of them a portion of the stock and that his only reason for not having the stock issued in their names when the corporation was organized was his agreement with Farrell to hold control of Central until the indebtedness to Farrell should be paid. The name Central Holding Co. did not impress itself upon the minds of the petitioners but they were familiar with the subject matter of the gift in that they knew it represented the interest Jacob was acquiring in the Welcome Hotel at Burns. These petitioners had confidence in and trusted Jacob and believed that he would look after their interests. They had had no business experience and anything affecting their business affairs was left entirely to Jacob, the husband and father. As soon as sufficient of the insurance proceeds had been collected the indebtedness to Farrell was paid and immediately Jacob, even though it had already been decided to liquidate Central by the distribution of the insurance proceeds, had 99 of the 100 Central shares standing in his name transferred, 25 shares to each of his daughters and 24 shares to his wife. Such action on the part of Jacob is certainly in harmony with the claim of the respondent that the petitioners were the owners of the stock and with the testimony of Jacob that at all times he regarded them as the beneficial owners thereof. Mrs. Jacob, when she received the certificates at the beach accompanied by Jacob's request that they be endorsed and returned to him, recognized the said certificates as representing the shares of stock which Jacob had promised to give to her and the three daugh-

ters. If the issuance of the shares in the names of these petitioners was not intended to evidence actual ownership, then Jacob needlessly put himself and petitioners to much unnecessary trouble and his action in having the stock so issued was without purpose and without meaning. Furthermore, the act of the petitioners in endorsing the certificates and returning them to Jacob as requested is not out of harmony with the conclusion that the stock did belong to the petitioners. They looked to and expected Jacob to handle their business transactions. Accordingly, we find no occasion to repudiate for the petitioners the testimony of a witness which they themselves have called. On the record before us we conclude that the petitioners were the owners of 99 shares of Central stock at the time the fire insurance proceeds were distributed, 24 shares belonging to Agnes C. Jacob, and 25 shares each to the daughters.

In the contention that the respondent made an irrevocable election to treat Jacob as the owner of the Central shares and is accordingly estopped to assert transferee liability against these petitioners as the owners of such shares, we likewise find no merit. It is true that the respondent, upon examination of the income tax returns of the peti- [79] tioners for the year 1937, did conclude that they were not the owners of the Central shares and did not therefore realize gain upon the distribution by Central of the net insurance proceeds. These proceedings, however, are transferee proceedings calling for determination, not of the individual in-

come tax liability of the petitioners, but of their liability as transferees for income tax owing by Central. We find no basis in fact or law for application of the doctrine of estoppel and certainly there can be no proper claim of res judicata. Not only must estoppel be pleaded, but the party invoking estoppel must prove the facts to support it. Helvering v. Brooklyn City Railroad Co., 72 Fed. (2d) 274; Commissioner v. Yates, 86 Fed. (2d) 748. In the instant case the petitioners have not shown that they have in any way been damaged or misled to their detriment by the respondent and the claim of estoppel falls. To support a finding of res judicata the action in which the finding is sought must involve the same parties, the same facts, the same law. Here the petitioners rely for what they term estoppel by judgment upon the settlement of the transferee proceeding brought by Jacob to determine his liability as transferee for a deficiency in the income tax of Central for the fiscal year 1938 and upon the entry of decision by the Board giving effect to the settlement agreed to by the parties. In the instant case the tax involved is also income tax of the Central for 1938, to be exact, the tax reported by Central on its income tax return for the fiscal year 1938, but there the similarity ends. Here the petitioners are Agnes C. Jacob, Shirley May Jacob, Beverly Jean Jacob, and Gwendolyn E. Jacob, not Robert T. Jacob, as in the prior case, and the liability to be determined is their liability, not that of Jacob. Tait v. Western

Maryland Railway Co., 289 U. S. 620, relied on by the petitioners is clearly distinguishable. There the parties, namely, the United States and the Western Maryland Railway Co., as well as the facts and the law, were the same in the current case as in the prior case, while the petitioners here have never before been parties to any litigation involving their liability as transferees of Central for 1938 or any year and their claim, whether it be termed estoppel by judgment or res judicata, is without the necessary factual and legal support.

There is the further contention that the petitioners may not be held liable as transferees of Central because Jacob personally received the money distributed and at no time physically delivered any part of it to them. As to his reason for not delivering the money received to his wife and daughters, Jacob testified that in making the gifts of the shares of stock he did not have in mind gifts of cash or "turning over to them the cash which was realized unexpectedly" and felt that "it would be unwise, as a matter of fact, to turn over to them [80] the cash." It is to be noted, however, that he did not testify that the money did not belong to his wife and daughters or that he did not receive it for them. We have already pointed out that Jacob, on cross-examination, testified that he at all times considered that his wife and daughters were the beneficial owners of the Central stock issued to him, and we have found as a fact that they were the owners of 99 shares of the said stock at the time the fire insur-

ance proceeds were distributed. There is nothing in Jacob's failure physically to turn over the money to the petitioners that is necessarily inconsistent with their ownership of the stock or the money. The testimony of Jacob and the petitioners plainly shows that in all matters business and financial in which these petitioners were interested Jacob acted for them and, not only were they agreeable to his doing this, but they expected it of him. Furthermore, in the signing of the receipt of August 12, 1937, Jacob definitely established his relationship to the money. The money received by Jacob from Central was received for these petitioners and not for himself. The facts here are altogether different from the facts in W. R. Ross, 43 B.T.A. 1155, where Ross received the assets of the transferor corporation as his own and not for other individuals "considered" as owning said shares of stock. It is our opinion and we conclude that the petitioners are liable as transferees of Central to the extent of their respective shares of the amounts received by Jacob for them. Sec. 311, Revenue Act of 1936. The liability having attached under the statute, any subsequent appropriation by Jacob to his own use of the funds so received by him for the petitioners can not affect their liability herein.

That the distribution of the insurance proceeds by Central left it insolvent has been found as a fact, and the conclusion that the petitioners were transferees of Central within the meaning of the statute eliminates any necessity for considering their

claim that the respondent has failed to prove that they were the transferees of a transferee.

Decisions will be entered under Rule 50.

[Seal] [81]

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United States Board of Tax Appeals
Washington

Docket No. 108032

AGNES C. JACOB (Alleged Transferee),
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Board promulgated July 23, 1942, the respondent on August 18, 1942, filed a proposed recomputation of tax in accordance therewith, and this proceeding having been called from the Day Calendar of September 30, 1942, for settlement under Rule 50, at which time the petitioner entered no objection to the proposed recomputation, it is

Ordered and Decided: That there is an unpaid liability on the part of this petitioner as transferee of the assets of the Central Holding Company, transferor, for income and excess profits taxes due for the fiscal year ended June 30, 1938, in the re-

spective amounts of $2,581.09 and $2,320.21, with interest as provided by law.

(Signed) BOLON B. TURNER
Member.

Enter:

Entered Oct. 2, 1942. [82]

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The Tax Court of the United States

[Title of Cause.]

## PETITION FOR REVIEW OF UNITED STATES BOARD OF TAX APPEALS DECISION

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The petition of Agnes C. Jacob respectfully shows:

### I.
### STATEMENT OF CONTROVERSY

The contention of the parties out of which this controversy arises is as follows: Respondent asserts that the petitioner received funds from Central Holding Co. (taxpayer) upon an alleged liquidation of said corporation; that Central Holding Co. was insolvent at the time of the alleged distribution, or was rendered insolvent thereby; that the corporation was indebted to respondent for unpaid income and excess profits taxes for the taxable year ended June 30, 1939, in the sum of $6,007.82 plus interest, and that by reason thereof petitioner

was liable as a "transferee" to the extend of the funds alleged to have been received by petitioner.

Petitioner contends that she did not receive from the Central Holding Co. any funds or assets of any kind or character whatsoever, directly or indirectly; that she did not receive, directly or indirectly, from Robert T. Jacob, any funds or assets which had been the [83] property of the Central Holding Co.; that Robert T. Jacob did not receive any funds or assets from the Central Holding Co.; that the funds received by him were paid to him by E. W. Barnes for the sale by Robert T. Jacob to E. W. Barnes of 1/3 of the capital stock of the Central Holding Co.; that the Central Holding Co. was not insolvent at said time or rendered insolvent thereby; that Central Holding Co. was not liquidated at the time that Robert T. Jacob sold the stock to E. W. Barnes as aforesaid; that the funds received by Robert T. Jacob were not paid in liquidation of said corporation; that the said corporation continued for a long time thereafter to be a going concern and was thereafter engaged in the operation and management of a hotel property and purchased and was the owner of hotel property thereafter; that prior to the mailing of the deficiency letter to your petitioner asserting said transferee liability against her, respondent duly determined that your petitioner was not a transferee of any of the assets of said corporation and that Robert T. Jacobs only was such transferee; that thereafter respondent asserted a transferee liability against the said Robert T. Jacob and mailed

to the said Robert T. Jacob a deficiency letter and notice that he was liable as transferee of the assets of the said corporation based upon the receipts by said Robert T. Jacob of the same funds now alleged to have been received by your petitioner; that the said Robert T. Jacob appealed from said determination and assessment to the Board of Tax Appeals; that the said proceeding duly came on for trial before said Board of Tax Appeals; that during the course of the trial of said proceeding petitioner and respondent agreed to settle and [84] compromise the said controversy and a stipulation was entered of record in which it was, among other things, stipulated that Robert T. Jacob was the transferee of the fund in question and that a decision might be entered against him as such transferee; that the funds for which the said Robert T. Jacob became liable as transferee are the same funds for which respondent now seeks to hold petitioner liable as transferee; that by reason of the premises petitioner was not a transferee or a transferee of a transferee of any of the assets of said corporation; that the said issues were determined in the aforesaid proceedings and the respondent is thereby estopped from now asserting that petitioner is a transferee of the same fund.

That on April 8, 1941, respondent mailed to petitioner a deficiency notice that there would be assessed against her the amount of $2693.68 income tax, and the amount of $2207.62 excess profits tax, plus interest as provided by law; alleging same to constitute petitioner's liability as transferee of as-

sets of Central Holding Co. as unpaid income and excess profits taxes due from said Central Holding Co. for the taxable year ending June 30, 1938; that thereafter your petitioner filed with the United States Board of Tax Appeals her petition for a redetermination of the deficiency asserted as aforesaid; that on the 23rd day of July, 1942 the United States Board of Tax Appeals made and entered its findings of fact and opinion approving the deficiency as determined by the respondent holding petitioner liable as transferee in the sum of $2581.09 income tax and the sum of $2320.21 excess profits tax with interest thereon; and on the 2nd day of October, 1942 the Board of Tax Appeals entered and filed its decision thereon.

The petitioner being agrieved by said findings of fact, opinion, decision, and order, files this petition for a review thereof in [85] accordance with the provision of Section 1001 of Act of Congress approved February 26, 1926, entitled "Revenue Act of 1926."

II.

DESIGNATION OF COURT OF REVIEW

That your petitioner is an individual resident of the state of Oregon and within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, within which is located the office of the Collector of Internal Revenue with whom your petitioner has at all times mentioned herein made and filed her Federal Income Tax returns and does hereby designate the said Circuit Court of Appeals

for the Ninth Circuit as the court in which a review of said determination is sought.

## III.

## ASSIGNMENT OF ERRORS

A. The Board of Tax Appeals erred in holding that the Appellant was a transferee of assets of Central Holding Co., (taxpayer) because

(1) The uncontradicted evidence is that appellant received no assets whatsoever of the Central Holding Co.

(2) The undisputed evidence is that Robert T. Jacob alone received the funds alleged to have been transferred; that said Robert T. Jacob at all times retained the said funds as his own and holds the same adversely to the appellant; that appellant had no knowledge of the receipt of the funds by said Robert T. Jacob; that said Jacob did not receive the funds at their request or for their use or benefit, but received and retained the same for his own account, use and benefit.

B. The Board of Tax Appeals erred in refusing to hold

(1) that transferee liability (being a proceeding in rem) can not be imposed upon anyone who did not actually receive the res that is being followed in the transferee proceeding and [86]

(2) That Robert T. Jacob could not impose upon or create a personal liability against appellant by constituting himself a voluntary or gratuitous trustee or agent, as long as he retains the res,

and he claims and holds the same adversely to appellant; that even if appellant had a right to recover the fund from Jacob, such right could not subject her to personal liability as transferee until she actually acquired possession of the res.

C. The Board erred in holding that the transaction which resulted in the receipt of the funds in question by Jacob constituted a liquidation of the Central Holding Co. (taxpayer), and a division of its assets; and it further erred in refusing to hold that Jacob received the fund from E. W. Barnes (not the corporation) in payment of the sale of the capital stock by Jacob to E. W. Barnes.

D. The Board erred in holding that the Central Holding Co. (taxpayer) became insolvent by reason of the receipt of the fund in question by Robert T. Jacob and in refusing to hold that the taxpayer had sufficient property at said time and subsequent thereto with which to liquidate all its tax liability.

E. The Board erred in refusing to hold that appellee failed to exhaust his remedies against the taxpayer prior to proceeding against appellant as alleged transferee and that if the remedies against the taxpayer had been pursued the tax liabilities in question could have and would have been satisfied by taxpayer.

F. The Board erred in failing to find that appellee did not exhaust his remedies against the taxpayer corporation, and without a finding [87] of fact in favor of appellee in this respect the decision of the Board can not be sustained.

G. The Board erred in holding appellee was not estopped from proceeding against appellants as alleged transferee by the following former determinations;

(1) The determination of the Commissioner that appellant was not transferee and the refund of the income tax paid by petitioner based upon such determination and

(2) The decision rendered by the Board of Tax Appeals in the proceeding in which Robert T. Jacob was charged with and held to be the transferee of the funds in question being proceeding in the Board of Tax Appeals Docket No. 99161.

H. The Board erred in admitting in evidence respondent's exhibit K over appellant's objection.

I. The Board erred in admitting over appellant's objection the following evidence and in refusing to strike the same as follows:

(Mr. Pigg, continuing): What next did you do with it?

A. I wrote a letter to our deputy.

Mr. Bischoff: I object to that on the ground that the action taken on the warrant cannot be shown that way, and can only be shown by the return required by law to be made on the warrant.

The Member: The objection is overruled.

Mr. Bischoff: Note an exception.

The Member: An exception is noted. However, I don't see any necessity for going into details. You got the warrant that day?

The Witness: Yes.

The Member: What did you do with it, and what happened? [88]

The Witness: I wrote a letter to our Deputy at Pendleton asking him to call upon the taxpayer.

Mr. Bischoff: I will object to that as incompetent. The writing is the best evidence.

The Member: Are you objecting?

Mr. Bischoff: Yes.

The Member: The objection is overruled. Go ahead and tell me what you did with it.

The Witness: And then I personally called upon a Mr. Phipps in the American Bank Building, who is said to be counsel for the taxpayer, and asked him what the prospect of collection of the account was.

Mr. Bischoff: I move to strike that as incompetent, and as not binding upon the petitioners in this case.

The Member: The motion is denied.

Mr. Bischoff: Exception.

The Member: Exception noted. Go ahead.

The Witness (continuing): Then I next called on a deputy in the office by the name of McEntee,——

Mr. Bischoff: I object to that.

The Member: Just a moment. If you want to make an objection, you may move to strike everything afterwards. I am asking this question.

The Witness (continuing): I called upon one of the officers,—I asked him to call upon

one of the officers of the corporation at Arlington who, I believe, was in the Vendome Hotel there, and I asked him to make an appropriate investigation of the corporation's assets for the purpose of determining whether or not the tax could be collected; and the report of that deputy was in the negative, that the corporation was found to have an indebtedness in excess of the assets.

Mr. Bischoff: I move to strike.

The Member: Is that the answer to my question?

The Witness: Yes.

The Member: That concludes your statement? [89]

The Witness: Yes.

Mr. Bischoff: I move to strike the answer as incompetent, irrelevant and immaterial, and as hearsay on the ground that the action taken upon the warrant of distraint can only be established by the returns which are required to be made, endorsed thereon, by law.

The Member: The motion to strike is denied.

Mr. Bischoff: Note an exception.

The Member: Exception noted.

J. The Board erred in admitting oral testimony and exhibits pertaining to the income tax return of the Central Holding Co. for the year ended June

30, 1937 and in refusing to strike the same on appellant's motion.

AGNES C. JACOB
Petitioner.

(Duly Verified.)

[Endorsed]: T. C. U. S. Filed Dec. 28, 1942.

[90]

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[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW

J. P. Winchell, Esq., Chief Counsel, Bureau of Internal Revenue.

Please take notice that the petitioner, Agnes C. Jacob, on the 28th day of December, 1942 filed with the clerk of the United States Court of Tax Appeals her petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision and order of said Board heretofore rendered in the above entitled cause. A copy of said petition for review is hereunto attached and served upon you.

Dated this 28th day of December, 1942.

(s) S. J. BISCHOFF
1115 Public Service Building
Portland, Oregon
Attorney for Petitioner

Personal service of the foregoing notice together with a copy of the petition for review is hereby ad-

mitted and accepted this 28th day of December, 1942.

(s) J. P. WENCHEL
Chief Counsel,
Board of Internal Revenue
Attorney for Respondent

[Endorsed]: T. C. U. S. Filed Dec. 28, 1942.

[91]

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In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 108032

AGNES C. JACOB,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

No. 108033

SHIRLEY MAY JACOB,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

No. 108034

BEVERLY JEAN JACOB,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

No. 108035

GWENDOLYN E. JACOB,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

## STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL.

The appellants hereby designate as the points on which they intend to rely on these appeals as follows:

A. The Board of Tax Appeals erred in holding that the appellants were transferees of assets of Central Holding Co. (taxpayer), be- [92] cause

(1) The uncontradicted evidence is that Robert T. Jacob alone received the funds alleged to have been transferred; that said Robert T. Jacob at all times retained the said funds as his own and holds the same adversely to the appellant; that appellants had no knowledge of the receipt of the funds by said Robert T. Jacob; that said Jacob did not re-

ceive the funds at their request or for their use or benefit, but received and retained the same for his own account, use and benefit.

B. The Board of Tax Appeals erred in refusing to hold

(1) that transferee liability (being a proceeding in rem) can not be imposed upon anyone who did not actually receive the res that is being followed in the transferee proceeding and

(2) That Robert T. Jacob could not impose or create a personal liability against appellant by constituting himself a voluntary or gratuitous trustee or agent, as long as he retains the res, and he claims and holds the same adversely to appellant; that even if appellant had a right to recover the fund from Jacob, such right could not subject her to personal liability as transferee until she actually acquired possession of the res.

C. The Board erred in holding that the transaction which resulted in the receipt of the funds in question by Jacob constituted a liquidation of the Central Holding Co. (taxpayer), and a division of its assets; and it further erred in refusing to hold that Jacob received the fund from E. W. Barnes (not the corporation) in payment of the sale of the capital stock by Jacob to E. W. Barnes.

D. The Board erred in holding that the Central Holding Co. (taxpayer) became insolvent by reason of the receipt of the fund in [93] question by Robert T. Jacob and in refusing to hold that the taxpayer had sufficient property at said time and

subsequent thereto with which to liquidate all its tax liability.

E. The Board erred in refusing to hold that appellee failed to exhaust his remedies against the taxpayer prior to the proceeding against appellants as alleged transferee and that if the remedies against the taxpayer had been pursued the tax liabilities in question could have and would have been satisfied by taxpayer.

F. The Board erred in failing to find that appellee did not exhaust his remedies against the taxpayer corporation, and without a finding of fact in favor of the appellee in this respect the decision of the Board can not be sustained.

G. The Board erred in holding appellee was not estopped from proceeding against appellants as alleged transferees by the following former determinations:

(1) The determination of the Commissioner that appellants were not transferees and the refund of the income tax paid by appellants based upon such determination and

(2) The decision rendered by the Board of Tax Appeals in the proceeding in which Robert T. Jacob was charged with and held to be the transferee of the funds in question being proceeding in the Board of Tax Appeals Docket No. 99161.

H. The Board erred in admitting in evidence respondent's Exhibit K over appellants' objection.

I. The Board erred in admitting over appellants' objection incompetent evidence as to the al-

leged efforts of the respondent to exhaust the remedies against the transferor. [94]

J. The Board erred in admitting oral testimony and exhibits pertaining to the income tax return of the Central Holding Co. for the year ended June 30, 1937, and in refusing to strike the same on appellants' motion.

K. The Board erred in failing to give effect to the rule that the burden of proof was upon the commissioner to establish every element essential to a transferee liability.

(s) S. J. BISCHOFF,
Public Service Building,
Portland, Oregon
Attorney for Appellants

Service of a true and correct copy of the foregoing statement of points on which appellants intend to rely on appeal is hereby admitted this 30th day of January, 1943.

(s) J. P. WENCHEL
Attorney for Appellee

[Endorsed]: T. C. U. S. Filed Feb. 2, 1943. [95]

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[Title of Court and Causes] [96]

To the Clerk of the above entitled Court.

The following is petitioners' statement of the evidence in the above entitled proceedings for certification and transmission to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 22, 1942.

S. J. BISCHOFF
Public Service Building
Portland, Oregon
Attorney for Petitioners

Due and timely service of the foregoing statement of the evidence is hereby admitted and accepted this 30th day of January, 1943.

J. P. WENCHEL
Attorney for Respondent

[97]

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## STATEMENT OF EVIDENCE PROPOSED BY PETITIONERS ON REVIEW

The following is a statement of the evidence in the above entitled proceedings, reduced to narrative so far as is material to the assignments of error contained in the Petition for Review. These cases which were consolidated for hearing, came on for hearing before Bolon B. Turner, Member of the United States Court of Tax Appeals, at Portland, Oregon, on December 18, 1941; S. J. Bischoff, Esquire, appeared for the Petitioners (Petitioners on review), and John Pigg, Esquire, appeared for Commissioner of Internal Revenue (Respondent on review).

BEVERLY JEAN JACOB

called by Respondent, testified:

Direct Examination

I am the daughter of Robert T. Jacob. I signed 1937 income tax return prepared by my father. There is notation of 25 shares Central Holding Co. stock on it.

1937 Income Tax Return admitted without objection, Respondent's Exhibit A.

RESPONDENT'S EXHIBIT A

This Exhibit is the Income Tax Return of Beverly Jean Jacob, one of the Petitioners, for the calendar year 1937. It reports as revenue during that year $4,948.04 as gain from the sale of twenty-five shares of the stock of Central Holding Co., at a cost of $157.48, and gross sale price of $5,105.52.

I signed "Gift Tax" return at request of my father. I do not recall what he said at the time. It contained information of 25 shares Central stock.

[98]

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Gift Tax Return admitted without objection as Respondent's Exhibit B.

RESPONDENT'S EXHIBIT B

This Exhibit is the Gift Tax Information Return filed by Beverly Jean Jacob, one of the Petitioners herein, for the calendar year 1937, in which she reports the receipt of the gift of twenty-five shares

(Testimony of Beverly Jean Jacob.)
of the capital stock of the Central Holding Co. Approximate value of gift: $5,105.52.

Testimony as Petitioners' witness:

I am 18 years old. I never received any stock of Central Holding Co. I never received any money from Central Holding Co., Barnes or Conley.

Thereupon, the following ensued:

Q. Did you ever receive any money from your father, that is, outside of a few cents spending money—something in the neighborhood of $5,000? Did you receive such a sum from your father?

A. No, I did not.

Q. Did he ever give you any money purported to be money coming from Central Holding Co.?

A. No, none at all.

My signature is on the back of the stock certificate. I don't remember when I first saw it. I signed it at Seaside. I couldn't say if I ever saw or had it before I signed it.

---

Cross Examination

Stock Certificate, marked and received in evidence as Respondent's Exhibit C. without objection.

RESPONDENT'S EXHIBIT C

This Exhibit is stock certificate No. 8 for twenty-five shares of the capital stock of the Central Holding Co., issued in the name of Beverly J. Jacob,

(Testimony of Beverly Jean Jacob.)
dated June 23, 1936, signed E. W. Barnes, President, Robert T. Jacob, Secretary, and [99] endorsed in blank by Beverly J. Jacob. Endorsement dated August 10, 1937, witnessed by Agnes C. Jacob.

I do not know why I executed the Income Tax Return.

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SHIRLEY MAY JACOB

called by Respondent, testified:

Direct Examination

I am the daughter of Robert T. Jacob. Don't remember hearing of Central Holding Co. before today. I signed the 1937 Income Tax Return. It contains statement of 25 shares Central stock. The Return was mailed by my father to me at Dallas, Texas, where it was executed March 7, 1938. Don't recall having noticed it referred to Central.

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Return 1937 received, Respondent's Exhibit D, without objection.

RESPONDENT'S EXHIBIT D

This Exhibit is the Income Tax Return of Shirley May Jacob, one of the Petitioners, for the calendar year 1937. It reports as revenue during that year $4,948.04 as gain from the sale of twenty-five shares of the stock of Central Holding Co., at a cost of $157.48 and gross sale price of $5,105.52

I couldn't state why Return was signed. I signed Gift Tax Return, dated March 20, 1938. I knew

(Testimony of Shirley May Jacob.)

I was supposed to be given some stock. I don't remember the circumstances.

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Received as Respondent's Exhibit E, without objection.

RESPONDENT'S EXHIBIT E

This Exhibit is the Gift Tax Information Return filed by Shirley May Jacob, one of the Petitioners herein, for the calendar year 1937, in which she reports the receipt of the gift of twenty-five shares of the capital stock of the Central Holding Co. Approximate value of Gift: $5,105.52.

I signed stock certificate No. 7, for 25 shares Central stock on reverse side, [100] August 10, 1937, at Seaside, Oregon.

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Received as Respondent's Exhibit F, without objection.

RESPONDENT'S EXHIBIT F

This Exhibit is stock certificate No. 7, for twenty-five shares of the capital stock of the Central Holding Co., issued in the name of Shirley M. Jacob, dated June 23, 1936, signed E. W. Barnes, President, Robert T. Jacob, Secretary, and endorsed in blank by Shirley M. Jacob; endorsement dated August 10, 1937, witnessed by Agnes C. Jacob.

(Testimony of Shirley May Jacob.)

Cross Examination

I heard of the Welcome Hotel. I don't recall it was owned by Central. I never had stock certificate at any time before I signed it. I did not retain it. I never received $5,105.52 from the Central Holding Co., Conley, Barnes or from my father. I never received any sum of money from any of them other than my school money, my allowance for spending money, once a month. Never received any money which purported to come from Central Holding Co.

Redirect Examination

Questioned by Mr. Pigg, she testified:

Q. Isn't it a fact that Mr. Jacob, your father, supplied you with a considerable amount of money at or about that time as a fund for paying your college expenses?

A. No, I did not receive such a fund.

Q. Now you have testified, I believe, that you never received any money from Central Holding Co., the Welcome Inn or Hotel, Mr. Barnes, Mr. Conley or Mr. Jacob? A. No, I did not.

Recross Examination

I do not recall the circumstances under which I signed the Returns. I recall [101] my father telling me something about some stock. I am 23 years old.

GWENDOLYN E. JACOB

called by Respondents, testified:

Direct Examination

I am the daughter of Robert T. Jacob. I am more than 21 years old. The Income Tax Return for 1937 was executed by me March 7, 1938. It contains information of 25 shares Central stock. The Return was sent to me at Dallas, Texas, to be signed and returned. I recall a statement made that my father was going to give us some stock, but I didn't receive it. I didn't know the name of it.

---

Received as Respondent's Exhibit G, without objection.

RESPONDENT'S EXHIBIT G

This Exhibit is the Income Tax Return of Gwendolyn E. Jacob, one of the Petitioners, for the calendar year 1937. It reports as revenue during that year $4,948.04 as gain from the sale of twenty-five shares of the stock of Central Holding Co., at a cost of $157.48 and gross sale price of $5,105.52.

My signature is on the "Gift Tax" return, but I don't recall signing it. I don't recall where I was, or who was present when I signed it. I imagine I signed it at my father's request.

Thereupon, the following occurred:

Q. At about that time or at a previous time, had your father, Mr. Jacob, said anything to you about

(Testimony of Gwendolyn E. Jacob.)

making a gift of stock of the Central Holding Co., or any other corporation, to you?

A. He mentioned a gift of stock, but that was something that didn't go into effect, because we didn't receive it.

Q. You mean at that time?

A. Or at any time. [102]

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Received as Respondent's Exhibit H, without objection.

RESPONDENT'S EXHIBIT H

This Exhibit is the Gift Tax Information Return filed by Gwendolyn E. Jacob, one of the Petitioners, for the calendar year 1937, in which she reports the receipt of the gift of twenty-five shares of the capital stock of the Central Holding Co. Approximate value of gift: $5,105.52.

My signature is on certificate for 25 shares Central stock. I still say I never had any stock in that company. Certificates were sent to us to be signed, and they were given to my mother to return to my father. I was not told why I was signing it. I didn't associate it with the prior statement of my father, that he intended to give me some stock. It was signed August 10, 1937.

---

Received as Respondent's Exhibit I, without objection.

(Testimony of Gwendolyn E. Jacob.)

RESPONDENT'S EXHIBIT I

This Exhibit is stock certificate No. 6 for twenty-five shares of the capital stock of the Central Holding Co., issued in the name of Gwendolyn E. Jacob, one of the Petitioners, dated June 23, 1936, signed E. W. Barnes, President, Robert T. Jacob, Secretary, and endorsed in blank by Gwendolyn E. Jacob. Endorsement dated August 10, 1937, witnessed by Agnes C. Jacob.

Cross Examination

I did not know of Central Holding Co. I knew of Welcome Hotel. I did not receive $5,100-odd or any sum, from the Central Holding Co., James Conley, Edward Barnes or my father. I never received any sum of money which purported to come from Central; never received or had in my possession the stock certificate before I signed it.

Redirect Examination

My father did not make a substantial gift, or make available a substantial sum of money for college and educational purposes, in 1937. [103]

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R. P. KUENEKE

called by Respondent, testified:

Direct Examination

I am chief in Income Tax Division of J. W. Maloney's office. I am familiar with rolls and records concerning assessment of income taxes. Assessment

(Testimony of R. P. Kueneke.)

List shows assessment of income taxes $3,163.80, interest $13.00, and excess profits tax $2,844.02, interest $11.69, for year ended 6/30/38, against Central. It was signed by Guy T. Helvering, October 13, 1938. Amounts have not been paid. First notice and demand was issued October 6, 1938; second, October 18; Warrant of Distraint issued November 9. The Warrant is unsatisfied and not paid.

Cross Examination

The deficiency for the year ending 6/30/38, assessed against Central and Mr. Jacob, as transferee, was $3,207.22. These assessments against Mr. Jacob were certified to our office as paid for the year 1937 and 1938. Our records wouldn't indicate who paid them; it shows they were paid by or for Jacob.

Assessment certificate admitted as Respondent's Exhibit J, without objection.

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JAMES L. CONLEY

called by Respondent, testified:

Direct Examination

I was stockholder and vice-president of Central from organization, June, 1936, to August 18, 1937; E. W. Barnes was president. I ceased to be a stockholder August 18. Robert T. Jacob was secretary-treasurer. Barnes was to manage the hotel, Jacob to keep the books and make the Income Tax Returns, etc., and I to handle the legal affairs. As to tax

(Testimony of James L. Conley.)

matter of Central or its stockholders, we relied on Jacob. Central was organized to acquire the Welcome Hotel, Burns, Oregon. It purchased the property for $40,000, including $22,000 taxes. Jacob arranged with Farrell to loan [104] the corporation $15,000.00. The corporation was in business July 1, 1936 until the fire, July 15, 1937. The main building with all its contents was completely destroyed; the boiler room and an apartment over it outside of the main wall was not destroyed. The insurance adjustment was for a complete loss. After the fire, a considerable portion of the walls remained standing. The walls for the north half of the building were in bad shape, and later fell. The south end was in better condition, and could have been used for rebuilding. The land was taken back by the county under a foreclosure of tax liens. At the time of the fire, there were about $16,000 taxes unpaid. The value of that land that was left after the fire was considerably less than the taxes against it. I doubt if the ground and the remaining portion of the building was worth more than $10,000 at the outside. The hotel building, furniture and fixtures covered by $72,000 insurance was paid in full. We had left out of that insurance and other money about $61,000 after paying all bills, which was divided three ways, $20,422.10 to each of the three stockholders. I got $20,422.10, Barnes got a like sum, or at least it was left in the company, and Jacob got $20,422.10. There were two distributions; there was the $18,000 distributed in advance of the receipt of the Lloyd

(Testimony of James L. Conley.)

money. We paid out $10,733.68 out of the $18,000, and that left on hand $7,266.32, which was divided three ways, $2,422.10 to Barnes, and the same amount to me and to the Jacob interests. That distribution was made a few days before the last distribution on August 17th. I have receipts as to the first distribution ($18,000) but not as to the second distribution.

Thereupon, the following occurred:

Mr. Pigg: I will ask that these be received in evidence as Respondent's Exhibit K.

Mr. Bischoff: The Petitioners object to the document signed by R. T. Jacob, which purports to be for the Petitioners, on the ground that it is not binding on the Petitioners, and there is no evidence of authority to execute a receipt or receive money on their behalf, or that it was done pursuant to authority. [105]

The Member: The objection is overruled. It will be marked in evidence as Respondent's Exhibit K.

Admitted over objection, Respondent's Exhibit K.

Mr. Bischoff: Exception.

The Member: An exception is noted.

RESPONDENT'S EXHIBIT K

August 12, 1937

Received of Central Holding Co. the sum of Twenty-four hundred twenty-two and 10/100

(Testimony of James L. Conley.)

($2422.10) Dollars, being one-third net proceeds of insurance on hand this date. Application of such distribution to be later determined.

JAS. L. CONLEY

August 12, 1937

Received of Central Holding Co. the sum of Twenty-four hundred twenty-two and 10/100 ($2422.10) Dollars, being one-third net proceeds of insurance on hand this date. Application of such distribution to be later determined.

E. W. BARNES

August 12, 1937

Received of Central Holding Co. the sum of Twenty-four hundred twenty-two and 10/100 ($2422.10) Dollars, being one-third net proceeds of insurance on hand this date. Application of such distribution to be later determined.

R. T. JACOB

for

AGNES C. JACOB
GWEN JACOB
SHIRLEY JACOB
BEVERLY JACOB

Account sheet received as Respondent's Exhibit L, without objection. [106]

## RESPONDENT'S EXHIBIT L

Welcome Hotel
Central Holding Co.

| | | | | | |
|---|---|---|---|---|---|
| Paid a/c purchase price | $ 1,500— | Bk loan | 10,000.00 | Ed. pd. for me | $ 1,384.08 |
| Paid toward taxes | | Bk loan Int. | 23.33 | Ed. gave me | 204.57 |
| Dec. 1936— | 500— | | 10,023.33 | | 1,588.65 |
| Paid Rand | 416.66 | Bal. 1st Nat'l | 57.60 | | 3,000 |
| | 2,416.66 | Jones | 250.00 | | 4,588.65 |
| | | Epperson-Lua Farm | 184.00 | 2,422.10 | |
| | | Caldwell—United F.F. | 218.75 | 2 | |
| | | | 10,733.68 | 4,844.20 | |
| | | | | 4,588.65 | |
| | | | | 255.55 | |
| Rec'd from Cent. H. Co. | | Ins. Coll | 18,000.00 | | 2,422.10 |
| 1st div. Ins. | 2,422.10 | Expended above | 10,733.68 | | 1,588.65 |
| 2nd div. Ins. | 18,000.00 | | 3/ 7,266.32 | | 833.45 |
| | 20,422.10 | | 2,422.10 | 3,000. | |
| Pd. back toward | | | | 2,422.10 | |
| Inc. tax fund | 129.91 | | | 577.90 | |
| (Ed says this pd in cash to him) | | | | 255.55 | |
| | | | | 833.45 | |

(Testimony of James L. Conley.)

After that $2400 distribution, there was an additional distribution of $18,000 to each account. The corporation had no other assets, except this piece of land and there was some small amount retained for the purpose of paying some bills. I am not sure but that's my memory of it. There were no corporation minutes authorizing the distribution of the cash or other assets. Exhibit M is a photostatic copy of a notation I made at the time the stock certificates were delivered to Barnes. The second division of $18,000 each was made on August 17th, 1937.

The corporation had authorized 300 shares of no par common stock. There was a rearrangement of the entire stock holdings. There were six certificates, one to Jacob for 100 shares; one to Barnes for 1 share; another to Barnes for 26½ shares; another to Barnes for 72½ shares; one to me for 26½ shares; and one to me for 73½ shares. It was a condition of the loan that control of the corporation be vested in Jacob until after the loan was paid. Barnes and I each turned over to Jacob 26½ shares which, with his 100 shares gave him a total of 153 shares. The two certificates for 26½ shares each were to be returned after Farrell was paid. Those 53 shares were returned to me and Barnes by Jacob after the loan was paid, when the $2,422.10 distribution took place, a few days before the 17th of August, 1937.

Respondent's Exhibit M received without objection.

(Testimony of James L. Conley.)

RESPONDENT'S EXHIBIT M

| | | |
|---|---|---|
| R.T.J. | 1 | 1 |
| E.W.B. | 2 | 1 |
| E.W.B. | 3 | 26½ |
| O.G.B | 4 | 72½ |
| A.C.J. | 5 | 24 |
| G.E.J | 6 | 25 |
| S.M.J. | 7 | 25 |
| B.J.J. | 8 | 25 |
| J.L.C | 9 | 50 |
| J.E.C | 10 | 50 |
| | | 300 |

Stock in Central Holding Co.

[108]

At the time I made these notes (Exhibit M) there was almost a complete rearrangement. Only No. 1 certificate was left outstanding of the old certificates. It is my recollection that at that time all of them were rewritten except No. 1. Exhibit N is the old original No. 1 certificate for 100 shares.

---

Respondent's Exhibit N received without objection.

RESPONDENT'S EXHIBIT N

This Exhibit is certificate of stock number 1, for one share of the capital stock of Central Holding Co., issued in the name of Robert T. Jacob, dated June 23, 1936, signed E. W. Barnes, president, Robert T. Jacob, secretary. Endorsement on the back not signed but dated August 10, 1937.

(Testimony of James L. Conley.)

I was present when Jacob surrendered his stock certificates.

Long after the surrender of Jacob's certificates, I heard it referred to as a sale; but I never heard it referred to as a sale prior to August 18, 1937.

Barnes and I met Jacob, August 17, 1937, before the distribution of the money at the bank. Jacob left the bank before Barnes and I did and it was later in the day when we saw Jacob. I know the next day, when the money was paid over, Jacob came into my office with the certificates. I did not prepare the stock certificates here. I gave Jacob the stock certificate book some few days before August 17. I have never seen the stock book, or whatever it was, since I returned it to Jacob. I never had any of the stock certificates, except my own, and that was delivered to Barnes on the 18th of August. There was nothing said about what I would do with my stock; everybody knew I was giving it to Barnes. That was the end, so far as I was concerned, when I was paid the $20,422.10 I gave Barnes my stock. He paid me no consideration for the stock.

All I know about the Barnes and Jacob deal is that Jacob told me if he took his money out, he would give Barnes his stock. I saw him give his stock to Barnes. But if they had any other consideration, I don't know. I heard Jacob say Barnes ought to pay his overdrafts. He had drawn a little in advance of salary or expenses. [109] Jacob stated he ought to straighten that up; but so far as the

(Testimony of James L. Conley.)

sale of the stock was concerned, I never heard anything of that nature at all.

Thereupon, Mr. Conley testified as follows:

Q. By Mr. Pigg: Did you have any understanding, Mr. Conley, as to the purpose for which the stock certificates were to be given to Mr. Barnes after this distribution?

A. Well, it was to vest the ownership of the stock in Mr. Barnes so that he could go ahead and build, or do whatever he wanted to with the company.

Q. Had Mr. Barnes expressed a desire or purpose to do so, that you know of, a number of times?

A. Yes, Mr. Barnes mentioned it to me as early as Saturday; that is, the second day after the fire. He wanted to know, in the first place, what Mr. Jacob and I thought about it, and whether Mr. Jacob and I would join him in rebuilding; and I told him that I understood that Mr. Jacob wanted to take his money and get out; and, so far as I was concerned, I would join in the rebuilding if we could do it with the money that we had and not leave too much indebtedness. In other words, I didn't want to go very heavily in debt. And then, after discussing the matter a few minutes, Mr. Barnes said, "If you and Mr. Jacob step out, will you give me your stock?" I said, "I can speak only for myself, and if I step out, I will give you my stock, and I will ask Mr. Jacob when I get back to Portland."

I asked Jacob whether he would be willing to give

(Testimony of James L. Conley.)
Barnes his stock, and he told me he would. Barnes was indifferent towards continuation of the corporation; and looked upon it more or less as a nuisance.

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Respondent's Exhibit O received without objection.

RESPONDENT'S EXHIBIT O

This Exhibit consists of five certificates of stock as follows: [110]

1. Certificate #3 for 26½ shares of capital stock of Central Holding Company issued in the name of E. W. Barnes, dated June 23, 1936, signed E. W. Barnes, president, Robert T. Jacob, secretary.

2. Certificate #4 for 72½ shares of capital stock of Central Holding Company issued in the name of Olive G. Barnes, dated June 23, 1936, signed E. W. Barnes, president, Robert T. Jacob, secretary.

3. Certificate #5 for 24 shares of capital stock of Central Holding Company issued in the name of Agnes C. Jacob, dated June 23, 1936, signed E. W. Barnes, president, Robert T. Jacob, secretary. Endorsed in blank by Agnes C. Jacob, witnessed by Gwendolyn E. Jacob. August 10, 1937.

4. Certificate #9 for 50 shares of capital stock of Central Holding Company issued in the name of James L. Conley, dated June 23, 1936, signed E. W. Barnes, president, Robert T. Jacob, secretary.

5. Certificate #10 for 50 shares of capital stock of Central Holding Company issued in the name of

(Testimony of James L. Conley.)

James L. Conley, dated June 23, 1936, signed E. W. Barnes, president, Robert T. Jacob, secretary.

Cross Examination

When the $6,000 or $7,000 was distributed, no stock was handed back. We didn't regard the stock as involved; we had the money on hand, and distributed it. The final distribution was made August 17, and both Jacob and I delivered our stock to Barnes the next day. Before any distribution of any kind was made, there was an understanding that I was to surrender my stock to Barnes, and Jacob was to surrender his stock to Barnes, and we both surrendered it, pursuant to that understanding. When the stock was delivered, the corporation was not dissolved, the corporation continued and in December, 1937, purchased another hotel at Arlington, Oregon, which was named the Welcome Hotel. The big neon sign, Welcome Hotel was transferred from Burns and put on the hotel at Arlington.

About the time the first $18,000 was received from insurance, $5,000 was forwarded to the Harney County Bank in Burns, and an account opened in the name of the Central. Part of that $5,000 was used to purchase land and an uncompleted structure known as Hines Hotel. The property was first taken in the name of Barnes and his wife, and then transferred to Central and by Central to Amato, as a part of purchase price of the hotel at Arlington. [111]

The property at Arlington was conveyed to the Central Holding Co. by the Amato brothers and

(Testimony of James L. Conley.)

father. Purchase price of that property was $50,000; $6,313.08 cash; $15,000 by conveyance of the Hines Hotel property; $5,000 by assuming taxes; and a $23,868 mortgage. The agreement of purchase was originally between Barnes and Frank Amato, the father, but it was understood it was to be purchased by Central; but it was more convenient in this preliminary agreement to have it between Barnes and Amato, and that is the way that it was done. Title to the property was conveyed to Central pursuant to arrangement, December 15, 1937. The corporation retained title until September, 1938. I did not know at any time anything regarding Jacob's intention to make a gift of his stock to his family. The first I head of it was August.

Four deeds received without objection as Petitioners' Exhibit 1.

PETITIONERS' EXHIBIT 1

This Exhibit consists of four deeds as follows:

1. Deed made by Pondosa Investment Company, grantor, to E. W. Barnes, grantee, dated July 24, 1937, conveying Lots 2 to 7, both inclusive, Block 98, Tract 5, Stafford Derbes & Roy subdivision, Harney County, Oregon. Consideration $10.00.

2. Deed made by Harney County, Oregon, grantor, to E. W. Barnes, grantee, dated August 4, 1937, conveying Lots 2, 3, 4, 5, 6 and 7, in Block

(Testimony of James L. Conley.)

98, Tract 5, of Stafford, Derbes & Roy subdivision to the City of Hines, Oregon, Harney County, Oregon. Consideration $2,809.27.

3. Deed by E. W. Barnes, grantor, to Olive G. Barnes, his wife, grantee, dated August 4, 1937, conveying real property. Lots 2, 3, 4, 5, 6 and 7 in Block 98, in Tract 5 of Stafford, Derbes & Roy subdivision to City of Hines, Harney County, Oregon. Consideration $10.00.

4. Deed by Olive G. Barnes and E. W. Barnes, wife and husband, grantors, to Central Holding Company, grantee, conveying Lots 1 to 53, both inclusive, in Block [112] 98, Tract 5, Stafford, Derbes & Roy subdivision, Harney County, Oregon. Consideration $10.00.

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Two deeds received without objection as Petitioners' Exhibit 2.

PETITIONERS' EXHIBIT No. 2

This Exhibit consists of two deeds:

1. Deed from Frank Amato and Maria Amato, husband and wife, grantors, to Central Holding Company, grantee, dated December 15, 1937, conveying the real property which was known as the Arlington Hotel, the name of which was changed to the Welcome Hotel. The expressed consideration is $10.00.

2. Deed by Joe Amato and Rose Amato, husband and wife, grantors, to Central Holding Com-

(Testimony of James L. Conley.)

pany, grantee, dated December 15, 1937, conveying the real property which was known as the Arlington Hotel, the name of which was changed to the Welcome Hotel. The expressed consideration is $10.00.

Deed received without objection as Petitioners' Exhibit 3.

PETITIONERS' EXHIBIT No. 3

Deed. Central Holding Company, grantor, to Frank Amato, grantee, dated Deember 11, 1937, conveying real property. Lots 1 to 17, both inclusive, and Lots 22 to 43, both inclusive, in Block 98, Tract 5, Stafford, Derbes & Roy subdivision, Harney County, Oregon. Expressed consideration $10.00.

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Redirect Examination

The $5,000 sent to Burns from Portland, represented funds of the Central Holding Co. from the United Fireman's policy.

It was agreed at the time the $5,000 was sent to Burns that the corporation was going to be liquidated out of that $5,000.

The Hines property was turned in on a deal, by which Mr. Barnes acquired the Arlington Hotel. Barnes used a portion of the $5,000 to acquire the Hines property [113] and, in turn, the Arlington Hotel property, and then, in turn, charged himself with it. The Hines property was traded in on the Arlington property.

(Testimony of James L. Conley.)

Petitioners' Exhibit 1 covers a portion of the Hines property; the portion on which the unfinished hotel was located. There was also included in the Hines transaction some 40 or 50 other lots, but this Petitioners' Exhibit No. 1 covers Lots 2 to 7, inclusive, Block 98, Tract 5, which is the portion of the Hines property on which the unfinished hotel was located.

The portion of the Hines land with the hotel building is the part that went to Amato in the trade. The transfer of the title to the Arlington Hotel property to the Central was done on advice of Jacob, the 17th of August, 1937. At that time he told Barnes and me there would be no taxes because of any distribution of funds of Central Holding Co. if it remained in existence and either purchased another hotel or rebuilt the old hotel; and it was pursuant to that advice that the company was kept in existence, as I understand it. I requested Jacob to cover the matter in a letter, and there seemed to be some dispute about the letter. Jacob later gave me a copy of a letter that he was supposed to have written to Barnes. Barnes said that he never received it. December, 1937 or January, 1938, I asked Jacob if he had written Barnes. He said he had. I asked for a copy, and that afternoon he sent up a copy of a letter he claims he wrote Barnes. The letter referred to the statute covering enforced liquidation. I read the section and it seemed to be materially different from what Jacob had said; I went back and told Jacob what

(Testimony of James L. Conley.)

the statute said. He still insisted he was right, and made an explanation that seemed reasonable.

Jacob prepared the return for the fiscal year June 30, 1937 and Barnes signed it. [114]

Recross Examination

Letter, 8/18/37, received as Petitioners' Exhibit 4, without objection.

PETITIONERS' EXHIBIT No. 4

August 18, 1937

E. W. Barnes, President
Central Holding Company
Burns, Oregon

Dear Mr. Barns:

At the request of Mr. Conley, I am confirming the information given you in person respecting the tax liability of the Central Holding Company on account of the profits resulting from the burning of the Welcome Hotel, at Burns.

As stated to you, the Internal Revenue Act of 1936, Section 112, provides:

> "Involuntary conversions.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secre-

(Testimony of James L. Conley.)

tary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended."

You will observe that the condition imposed is that the money received be expended in the acquisition of other property, similar or related in service or use to the property converted or destroyed. You have advised that you will purchase the hotel property at Hines, Oregon, which you propose to complete and use to carry on the hotel business formerly conducted at Burns, Oregon. It is my understanding that you will use the same name of the hotel at Burns, to-wit: "The Welcome Hotel". Although the regulation provides that it is not necessary to earmark the moneys received and to be received, when your new books are opened a "replacement fund" account should be set up and all of the moneys which you receive that are to be applied in the purchase of property, furniture, equipment, etc., [115] should be credited to this replacement fund, and the expenditures charged against it as they are made.

As I have already advised you, it is absolutely necessary that you keep the Central Holding Com-

(Testimony of James L. Conley.)

pany alive for the purpose of replacing the property burned and all properties acquired must be acquired in the name of the Central Holding Company. After this has been done, if it is your desire to liquidate the corporation, then upon such liquidation, you and such other stockholders as you may have in the Company at the time of liquidation would be subject to the personal income tax upon the basis of any gain which might be realized, measured by the difference between the cost of your stock and the fair market value of the Corporation's property at the time of liquidation. If there is a good prospect that the Corporation will make considerable profits from year to year from operations, it would be well from your standpoint to liquidate the Corporation soon after your new hotel has been completed. This would be beneficial in two respects: First, you would save the excessive corporation taxes, and secondly: the individual profit, if any, would doubtless be less, before than after several years of successful operation. I believe the above covers the case sufficiently, but if there is any further information you desire, I shall be very glad to supply it.

Very truly yours,

ROBT. T. JACOB

RTJ:RN

Copy to James L. Conley

1312 Public Service Bldg.

Portland, Oregon

January 3, 1938

(Testimony of James L. Conley.)

(Mr. Conley continuing): I believe the advice given by Jacob was given in good faith. I didn't question it at all. I was sure of it; I trusted Jacob entirely, and I knew he was a competent income tax man.

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## ROBERT ELLISON

called by Respondent, testified:

### Direct Examination

I have been Special Zone Deputy in the office of J. W. Maloney, for about 8 years. I had something to do with efforts to collect tax assessed against Central. I received a warrant for distraint in March, 1938. [116]

Respondent's Exhibit P received in evidence without objection.

## RESPONDENT'S EXHIBIT P

Respondent's Exhibit P is as follows: [117]

23C RCD 10/19/38 No. 8663

### WARRANT FOR DISTRAINT

| Balance Forward | Date | Charge | Last Credit |
|---|---|---|---|
| ---------- | ---------- | ---------- | ---------- |
| ---------- | ---------- | ---------- | ---------- |

| Unpaid Balance | Account Number and Remarks |
|---|---|
| 6032.51 | Sept—40024—1938—EP. FY 6/30/38 IT due with int a/c delinquency. |

(Testimony of Robert Ellison.)

Central Holding Company, Inc.
1226 American Bank Bldg.,
Portland, Oregon.

Date of First Notice:
10/5/38
Date of Second Notice:
10/18/38

To Robert Ellison, Deputy Collector.

Whereas, in pursuance of the provisions of the Acts of Congress relating to internal revenue the above-named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; And Whereas, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; And Whereas, said person or persons still neglect or refuse to pay the same; You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement below, and also such further sum as shall be sufficient for the fees, costs, and expenses of the

(Testimony of Robert Ellison.)

levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof.

Unpaid balance 3163.80 IT 13.00 Int 2844.02 EP 11.69 EP $6032.51.

IT: 3176.80
EP: 2855.71

Penalty of 5 per centum ..... .....

Delinquency interest computed from 10/10/38 to 11/9/38 29.75-x

IT: 15.67
EP: 14.08

Total tax, penalty and interest due on date of second notice $6062.26.

Amount of additional interest due from date of second notice ..... .....

Witness my hand and official seal at Portland, Oregon, this 9th day of November, 1938.

J. W. MALONEY
Collector of Internal Revenue
Internal Revenue Collection District of Oregon.

lien #5154 filed 3/7/39 Clk., U. S. Dist. Court,

(Testimony of Robert Ellison.)

Portland, Ore. & County Clerks, Multnomah Co. (Portland); Harney Co. (Burns) & Gilliam Co. (Condon, Ore.). [118]

## RETURN OF DEPUTY COLLECTOR

*I hereby certify that, pursuant to the herein warrant of distraint, I proceeded to levy upon and sell the property herein described in order to satisfy the taxes, penalties, and interest herein stated and required by law, and that all the provisions of law were strictly complied with; that the property was sold at public auction, after due notice, to the highest bidder at the prices herein stated:

1. Date of receipt of warrant .....
2. Date of notice of sale .....
3. Description of property levied upon .....
   .....
4. Notice of sale:
   By publication in newspaper at .....
   By posting notice at following places .....
   .....
5. Name of purchaser .....
6. Amount received from sale .....$.....
7. Cost of levy and sale .....$.....

8. Net proceeds .....$.....

The gross proceeds, amounting to $....., are herewith inclosed.

*I have not executed the within warrant for the following reasons: .....

.....

(Testimony of Robert Ellison.)

..... ..... .....

Dated at ....., 193..... .....

.....

Deputy Collector.

*Strike out lines inapplicable.

## INSTRUCTIONS

1. The collector will maintain a file consisting of copies of all warrants of distraint issued. Each warrant should be numbered and the number and name of the deputy to whom issued entered on Form 824. This will enable the collector to readily trace every warrant issued and insure its prompt return. Upon the return of the warrant by the deputy the entries on Form 824 should be completed, so that it will give a complete history of all proceedings on said warrant, and in case of the sale of real estate, proper entries should also be made in Record 21. Upon the execution of the warrant it should be promptly returned to the collector, with a report showing, in full, what action was taken in each case. A warrant can not be considered closed until all interest due is collected or an offer in compromise is tendered in lieu of such interest. A report on Form 210 should be made to the Commissioner of Internal Revenue in all cases where personal property is sold under a warrant for distraint.

2. Sixty days are deemed ample time for the execution and return of a warrant for distraint by a deputy collector. When report is delayed beyond

(Testimony of Robert Ellison.)

that time the delinquent deputy should be called on for an explanation of the cause of such delay, and if not satisfactory the collector will require the deputy to execute and return the warrant at once.

3. When a warrant for distraint is returned with the report of no property found liable to distraint, the deputy so reporting must accompany the return warrant with his affidavit on Form 53. This form should not be executed in any estate tax case until after the most searching inquiry has been made as to the property comprising the gross estate which is subject to distraint proceedings.

4. Attention of distraining officers is called to the following provisions of law: "Provided, That there shall be exempt from distraint and sale, if belonging to the head of a family, the schoolbooks and wearing apparel necessary for such family; also arms for personal use, one cow, two hogs, five sheep and the wool thereof, provided that the aggregate market value of said sheep shall not exceed fifty dollars; the necessary food for such cow, hogs, and sheep, for a period not exceeding 30 days; fuel to an amount not greater in value than twenty-five dollars; provisions to an amount not greater than fifty dollars; household furniture kept for use to an amount not greater than three hundred dollars; and the books, tools, or implements, of a trade or profession, to an amount not greater than one hundred dollars, shall also be exempt; and the officer making the distraint shall summon three disinterested householders of the vicinity, who shall ap-

(Testimony of Robert Ellison.)

praise and set apart to the owner the amount of property herein declared to be exempt."

5. Care must be exercised in estate tax cases to ascertain that the property seized to enforce the collection of the outstanding assessment clearly is subject to distraint. [119]

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I wrote a letter to our deputy.

Thereupon, the following ensued:

Mr. Bischoff: I object to that on the ground that the action taken on the warrant cannot be shown that way, and can only be shown by the return required by law to be made on the warrant.

The Member: The objection is overruled.

Mr. Pigg: Will you read the question, Mr. Reporter?

(Thereupon the last question was read aloud by the reporter as hereinabove recorded.)

Mr. Bischoff: Note an exception.

The Member: An exception is noted.

The Witness: I wrote a letter to our Deputy at Pendleton asking him to call upon the taxpayer.

Mr. Bischoff: I will object to that as incompetent. The writing is the best evidence.

The Member: Are you objecting?

Mr. Bischoff: Yes.

The Member: The objection is overruled. Go ahead and tell me what you did with it.

(Testimony of Robert Ellison.)

The Witness: And then I personally called upon a Mr. Phipps in the American Bank Building, who is said to be counsel for the taxpayer, and asked him what the prospect of collection of the account was.

Mr. Bischoff: I move to strike that as incompetent, and as not binding upon the Petitioners in this case.

The Member: The motion is denied.

Mr. Bischoff: Exception.

The Member: Exception noted. Go ahead. [120]

The Witness (Continuing): Then I next called on a deputy in the office by the name of McEntee——

Mr. Bischoff: I object to that.

The Member: Just a moment. If you want to make an objection, you may move to strike everything afterwards. I am asking this question.

The Witness (Continuing): * * * * * I asked him to call upon one of the officers of the corporation at Arlington, who, I believe, was in the Vendome Hotel there, and I asked him to make an appropriate investigation of the corporation's assets for the purpose of determining whether or not the tax could be collected; and the report of that deputy was in the negative, that the corporation was found to have an indebtedness in excess of the assets.

Mr. Bischoff: I move to strike.

The Member: Is that the answer to my question?

(Testimony of Robert Ellison.)

The Witness: Yes.

The Member: That concludes your statement?

The Witness: Yes.

Mr. Bischoff: I move to strike the answer as incompetent, irrelevant and immaterial, and as hearsay on the ground that the action taken upon the warrant of distraint can only be established by the returns which are required to be made, endorsed thereon, by law.

The Member: The motion to strike is denied.

Mr. Bischoff: Note an exception.

The Member: Exception noted.

Cross Examination

This warrant appears to have been issued on November 9, 1938. I got it March, 1939. The marks "5154 File 3-7-39" were placed on there the day it was presented to the court house for filing.

This warrant still remains unsatisfied. [121]

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EDWARD W. BARNES

called by Respondent, testified:

Direct Examination

I was President and original stockholder of the Central Holding Co. There were 27½ shares to myself and 72½ shares to my wife. 26½ shares were assigned to Jacob in connection with a contract with Jacob, Conley, myself and Farrell.

Exhibit Q, copy of contract June 20, 1936, be-

(Testimony of Edward W. Barnes.)

tween Robert T. Jacob, James L. Conley and E. W. Barnes, marked and received in evidence as Respondent's Exhibit Q without objection.

RESPONDENT'S EXHIBIT Q

This Exhibit is an agreement dated June 30, 1936 by E. W. Barnes, R. T. Jacob and Jas. L. Conley, which so far as is here material, provides that Robert T. Jacob is to "hold and control 51%" interest in and to the hotel property and furnishings until a loan of $15,000.00 made by Robert S. Farrell shall be paid in full. That a corporation is to be formed, and that 51% of the stock shall be issued to Robert T. Jacob and 49% to be divided equally between Barnes and Conley, and that after said loan is paid, Jacob shall immediately assign to Barnes and Conley sufficient of the stock to "equalize the interests of the parties hereto".

I signed the income tax returns of Central for fiscal years 1937 and 1938. The typewritten matter in the return of June 30, 1937, was prepared by Jacob and I never did see the inside of it until in 1938. When I signed the return, I asked him if he didn't have to sign it as secretary, and he said that he had resigned as secretary.

Return, 1937, marked for identification as Respondent's Exhibit R and offered in evidence.

Thereupon, the following occurred:

Mr. Bischoff: We object to this document as in-

(Testimony of Edward W. Barnes.)

competent, irrelevant and immaterial. It has to do with the year 1937, which is in no way involved in the contro- [122] versy now before the Board. We are concerned solely with the 1938 tax.

Mr. Pigg: Your Honor, I would like to be heard.

Mr. Bischoff: It has no bearing on the issue.

The Member: What is the purpose?

Mr. Pigg: It is twofold; and, especially, at this time, it is offered * * * one of the links in the chain of circumstances. This was a short-lived corporation, in business for two years, and the evidence here has covered the existing corporation from the time of its organization until the time of the destruction of the building by fire, and the Respondent thinks it is admissible on that ground. Secondly, the Respondent believes, to further connect this up, it will be quite material to the Government's contentions in this case.

Mr. Bischoff: I don't know of any issue present in the pleadings which would have anything to do with the year 1937.

* * * * * * *

The Member: The objection will be overruled. It will be marked in evidence and received as Respondent's Exhibit R.

Return, 1937, received as Respondent's Exhibit R.

Mr. Bischoff: Note an exception.

## RESPONDENT'S EXHIBIT R

This Exhibit is the Income Tax Return of the

(Testimony of Edward W. Barnes.)

Central Holding Company for the fiscal year ending June 30, 1937.

Return of Central for year ended June 30, 1938, bears my signature.

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Return, 1938, received as Respondent's Exhibit S, without objection.

RESPONDENT'S EXHIBIT S

This Exhibit is the Income Tax Return of the Central Holding Company for the fiscal year ended June, 1938. [123]

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I am familiar with the circumstances surrounding the acquisition of the hotel property at Burns, Oregon, by Central, which was destroyed by fire, and the manner and method and arrangements under which a disposal of the insurance proceeds were made. There were two distributions of the insurance proceeds, one of $2,400 and one of $18,000 each in August, 1937.

I can't exactly tell you the figures I received at both times, $20,422.10. $5,000 was wired to me at Burns from the U. S. National Bank here. I used that $5,000 to pay bills, a note of Conley's and I took $2,800 and bought the Pondosa Hotel in Hines, Oregon, six lots which the unfinished hotel stood on.

(Testimony of Edward W. Barnes.)

Questioning continued as follows:

Mr. Pigg: Now Mr. Barnes, explain to the Board the circumstances and the agreements and understandings that you had with Mr. Jacob and Mr. Conley, or either or both of them, surrounding the distribution of the cash, of the insurance proceeds, between Mr. Jacob and Mr. Conley and yourself?

* * * * * * *

A. Well, in the first place, I wanted to rebuild the hotel, and I came down here, and they didn't, either one of them; they said they wanted to get out. Conley said that if it didn't cost too much money and we didn't go in debt too much, it might be all right, but Mr. Jacob said he wanted to get out. * * * * I asked them if they would give me their stock, and they said "yes". Conley told me one time before that he would, and Mr. Jacob said "yes". * * * *

Q. After the distribution between you gentlemen of those proceeds on August 17, 1937, did the Central Holding Co. own or possess any property or assets other than the cash that had been distributed after the fire?

A. No. Except for the land or lots on which the hotel had theretofore stood. The unpaid state, county and city taxes were paid down to $16,000.

Assuming that the property had been free from any taxes and assessments—the fair value of the land and the walls or whatever stood after the fire was between $4,000 [124] and $5,000. After the

(Testimony of Edward W. Barnes.)

distribution of this cash, I was going to rebuild, and didn't because it cost too much money; and then we let it go back to the county.

Three months later, Central acquired the Arlington Hotel in the transaction on which the Hines property on which I used the $2800 insurance proceeds, was traded in for $15,000.00. It wasn't worth that. In buying the hotel at Arlington, I paid $5,000 cash, and I used about $4,000 repairing the hotel and fixing it over. The Hines property or the Arlington property have not stood in the name of the Central for two years.

I paid $5,000 in cash to Amato, and spent about $4,000 repairing the hotel, and had some other expenses out of the $20,000 and $400 that I got from the Central insurance. They got equal amounts,—Jacob and Conley. And Jacob told me, when I either bought or built, I could turn it back in my own name. But when I bought the property the 15th of December, I told Conley, my attorney, I wanted it released into my own name before the end of the year. That was about the middle of December, 1937, when I bought the hotel, in the name of the corporation. The money used to purchase it and the business was my own money. I decided to take title to that property in the name of Central because I was advised by Jacob if I bought or built and took it in the name of the Central Holding Co. there would be no tax. Jacob said that there would be a $3,000 tax if we split up and not bought or built, and that it would save each one of us $1,000

(Testimony of Edward W. Barnes.)

by doing that. I would rather have the company, anyway, because I might want to borrow some money and I could borrow quicker if I had a company. When I bought the hotel at Hines, it was my own money, because we had an agreement on the division of the money before I went back to Burns. I never purchased any shares from Jacob and he never sold me any. The arrangement with Jacob was, if I carried on the company, he would give me his stock and Conley would give me his; and the saving would be about $3,000 in taxes, $1,000 apiece; and I would rather have the company, anyway, figuring that if I needed any money to rebuild, I could borrow [125] a lot easier with the company. That was long before we had any distribution of any money. When I was down here, before the $5,000 was sent to Burns, that was the understanding.

At the time Jacob turned over the stock certificates to me, I did not pay or promise to pay him anything for them.

Thereupon, the following ensued:

Mr. Pigg: Mr. Barnes, I hand you four documents. One is the original stock certificate marked Respondent's Exhibit N, and three photostatic copies of stock certificates, marked Exhibits C, F, and I, and one of the photostatic copies, which is No. 8, in favor of Beverly Jacob, the photostat, which is No. 7 stock certificate, Exhibit F, is in favor of Shirley May Jacob, and stock certificate which is

(Testimony of Edward W. Barnes.)

No. 6, Respondent's Exhibit I, in favor of Gwendolyn E. Jacob, and I will ask you when you first saw those certificates, if you know.

A. Well, it is my recollection that on the 18th day of August, 1937, Mr. Jacob came into Mr. Conley's office, and he had a bunch of certificates in his hand, and he said "Ed, I have turned this stock over to my family, and naturally, you will have to sign the certificates", and he handed them over. I was at one end of the place, sitting at one desk, and he came along here (indicating) and Mr. Conley was here (indicating), and he handed the certificates over to me, and I got a pen and started signing them. I suppose it was to his family. It was unnecessary for me to read them.

Q. Did you observe at that time, Mr. Barnes, that these certificates were dated June 23, 1936?

A. No, I didn't look at the date or anything. I didn't look at the names. He just handed me those certificates and I signed them.

Q. Relying on his request and advice?

A. Yes. He was there, and Mr. Conley was there, too, and I signed the certificates. At that time, Mr. Conley told him that he had to have two certificates made, [126] because he promised to give his wife all his stock, and he had them there, too, and I think that I signed them right there.

Q. Mr. Barnes, I will hand you Exhibit O, which consists of four stock certificates, or photostatic copies thereof. One of the four is shown on the face of the Exhibit as being for 24 shares of stock in

(Testimony of Edward W. Barnes.)

favor of Agnes C. Jacob. What were the circumstances under which you signed that certificate? Were they the same as you have related with respect to the next preceding three that you have just referred to?

A. My recollection is that I signed five or six stock certificates that day. I may have signed 7. I don't know.

Q. Prior to that time, to your knowledge, was there any stock certificates issued, of the Central Holding Co. standing in the name of any one of Mr. Jacob's family, other than himself?

A. Not that I know of. No, I know there wasn't.

Cross Examination

I don't remember when Central deeded the Welcome Hotel property, at Arlington, to me and Mrs. Barnes. It was about 2 years ago. I tried to get it turned in to my own name the first of the year, but couldn't. It was in the name of the corporation, a year and a half, or better. To my recollection these certificates were made out on August 18, and that I signed them on that day, the day after the money was divided up. The money was divided up at the First National Bank on the 17th of August. I am sure that it was the next afternoon. He handed me those certificates to sign on that day.

Thereupon, the following occurred:

(Mr. Bischoff, questioning). Well, when did you ultimately get the certificates from Mr. Jacob?

(Testimony of Edward W. Barnes.)

The Member: Which certificates are you talking about?

Mr. Bischoff: I am talking about the certificates of Mr. Jacob's family, the 5 [127] certificates made out in the name of the Jacob family.

A. May I go back a minute? This morning, I heard Mr. Conley testifying that there were certificates made out for me on the 18th of August, and one for my wife. There wasn't.

Q. I am talking about the five certificates which were turned over to you ultimately, there was one share in Mr. Jacob's name, one certificate in Mrs. Jacob's name for 24 shares, and then there were three certificates of 25 shares each for the girls. Weren't those turned over to you in Mr. Conley's office on the 18th of August, and didn't you keep them after that time?

A. They were either left in there,—maybe I took them, but I don't think so. I think that they were left in Mr. Conley's safe.

Q. Do you want the Board to understand that on August 18, the certificates were made out, that you signed them, and either took them yourself or gave them to Mr. Conley to put in his safe for you?

A. Either one. * * * I know I signed certificates on the 18th, on Mr. Conley's desk. * * * I signed certificates on the 18th, and I seen some certificates on Mr. Conley's desk; I don't know what certificates, or how many, but he said they were his family's certificates.

Q. But is it clear now that the family certificates

(Testimony of Edward W. Barnes.)

that you signed on that occasion remained with you or Mr. Conley for you, to be in his safekeeping?

A. It was either in the safe, or they were handed to me, as I recall it. It was either one.

I never returned them to Mr. Jacob for any purpose.

Q. Isn't it a fact that the certificates were already endorsed by the members of the family when they were turned over to you on the 18th?

A. I don't know; I never looked at the back of them.

Q. You had them in your possession all the time didn't you?

A. I never had them in my possession to look at, even. [128]

Q. When you got the certificate, didn't you see that they were endorsed?

A. I never looked at the endorsements, no, I took Mr. Jacob's and Mr. Conley's word for everything. I signed the front of them, I know that. In fact, I didn't figure that they amounted to anything anyway. I paid cash, $5,000 in connection with the hotel deal in Arlington, out of the $20,400. I paid $5,000 in cash, and I spent about $4,000 in fixing the hotel up.

Q. You had said on a number of occasions that that $20,400 was your personal money?

A. Yes, sir.

Q. Didn't you set that money aside and treat it as the money of the Central Holding Co., the corporation?

(Testimony of Edward W. Barnes.)

A. I may have had it in a safety deposit box until I started to do things with it.

Q. Didn't you put it aside and treat it as money of the corporation?

A. No, not that I know of; I was using the corporation as a name, that is all.

My signature is on this letter dated January 24, 1938. That is a letter I wrote Jacob.

Letter, 1/24/38, marked and received in evidence as Petitioner's Exhibit 5, over Respondent's objection.

PETITIONER'S EXHIBIT No. 5

4006 N.E. Hoyt Street,
Portland, Oregon.
January 24, 1938.

Mr. Robt. T. Jacob,
Ninth Floor,
Public Service Building,
Portland, Oregon.

Dear Sir:

The date of the Hotel Welcome fire was the 15th day of July, 1937. Shortly after the fire, Mr. Conley [129] came to Burns. I told him I would like to rebuild the hotel. He told me that neither you nor he wanted to rebuild but made the suggestion that if he pulled out he would turn his stock over to me, gratis. He also said he figured you would do the same. I talked with him and reasoned with him to stay

(Testimony of Edward W. Barnes.)

in and rebuild the place but he couldn't see it that way. He said you, too, wanted to pull out. Shortly after that I came to Portland and talked with you and Mr. Conley. You said you wanted to pull out entirely and you both said you would turn your stock over to me gratis—and asked me to carry on the Central Holding Company. You, yourself, told both Conley and me that if the Company was not carried on and we divided up the money it would cost both you and Conley and myself a thousand dollars apiece for income tax. You said if I carried on the Company and built the hotel or bought a hotel, in case I did either one of these two things, I could then turn the Central Holding Company back to myself and there would be no income tax.

I relied upon you as an income tax man and followed through as per your instructions. On the 15th day of December I bought a hotel at Arlington in the name of the Central Holding Company. Shortly before the first of the year, I told Mr. Conley to get things in shape so that on the first of January (1938) I could turn this property back into my own name. On the 26th day of December I was here and asked Mr. Conley if the books had been fixed up so that I could turn the property back into my own name. He said he hadn't gotten around to it yet. I told him I wanted to have this all done by the first of the year—and he said he would

(Testimony of Edward W. Barnes.)

have it done. I did not return the first of the year, but I came a few days ago—and when I talked to him about this, he said he had run into a snag and he could not get the matter fixed up. He says he then went to you and you told him that you wrote me a letter to Burns, Oregon, on the 18th day of August explaining to me how to handle the situation. He asked for a copy of this letter and you gave him the supposed copy. The original of the copy you gave Mr. Conley I never received at Burns. In fact I did not receive any letter from you after the day that you and Conley took your money out of the Company.

The letter that you gave Conley a few days ago is not in line at all with the instructions you gave us at the time you took your money.

I have carried this thing all the way through according to the way you instructed me and I trust you as an income tax expert, believing you that I could do as you said, eventually, and put this thing into my own name. Now you tell Mr. Conley that things will have to be done differently than you told us in the beginning—and you tell him now that you don't want me to turn the Central Holding Company over to my own name. [130]

You know that I know nothing about corporation taxes and income tax. The money that was left in the Central Holding Company I can account for to the last penny and if there is

(Testimony of Edward W. Barnes.)

any tax to be paid on the $40,000.00 that you and Conley took out of the Company, you sure will have to pay it.

Mr. Conley tells me that you said everything is alright and that you will make up a statement showing that it is alright.

I will give you until Wednesday, January 26, 1938, to make up this statement and give it to Conley so that I can see it. Furthermore, I want you to give Conley the Company's stock books and minute book.

Yours turly,

(s) E. W. BARNES.

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Q. (Mr. Bischoff, continuing): Now, Mr. Barnes, I call your attention to a paragraph in this letter, reading as follows:

"Your know that I know nothing about corporation taxes and income taxes. The money that was left in the Central Holding Company, I can account for to the last penny, and if there is any tax to be paid on the $40,000.00 that you and Conley took out of the Company, you sure will have to pay it."

Didn't you refer in this letter to the $20,000-odd that you now claim was your personal money?

A. Well, you are asking me a question, and if you will keep still I will answer it. You are asking

(Testimony of Edward W. Barnes.)

me if I figured that $20,000 belonged to the Central Holding Co.?

Q. I am asking you whether your reference to the money that was left in the Central Holding Co., which you said you could account for to the last penny, wasn't a reference to money belonging to the company? Didn't you refer to that $20,400 as being money belonging to the company, which you now say was your personal money?

A. Yes, and I used it.

Q. That was corporation money?

A. It was my money, and I used it in the Central Holding Co., as he told me to; I used the Central Holding Co. just as a name, as he told me to. [131]

The $40,000 referred to in the letter must have been the $20,000-odd that Jacob received and the $20,000-odd that Conley received.

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AGNES C. JACOB

called by Respondent, testified:

Direct Examination

I am the wife of Robert T. Jacob. I heard of the Central Holding Co. I would say it was between 1936 and 1937. I recall a promise or statement made by Mr. Jacob about June, 1936, that he intended to give some stock of some corporation to me and our daughters. Certificate No. 5 for 24

(Testimony of Agnes C. Jacob.)

shares to Agnes C. Jacob refers to me. On the reverse side my signature appears. It is dated August 10, 1937. I didn't pay any particular attention to the date, but I would say my signature was affixed on that date. I first saw this certificate when I signed it. It came to me by mail from Mr. Jacob at Portland. I was at Seaside with my daughters. Mr. Jacob wrote to sign and send them back. I knew what I was signing. I understood it to be the Welcome Hotel and the shares relating to the shares of stock that Mr. Jacob had promised to give us. The circumstances were the same in all respects as to the children's certificates and mine. They were all signed at the same time. My income tax return for 1937 bears my signature on the reverse side, attested April 15, 1938. I requested of the Collector an extension for filing this return, through Mr. Jacob. There is described on it 24 shares of stock of the Central Holding Co. My husband prepared the statement regarding the stock. He is my legal adviser, and my attorney. He prepared this return. He always prepares it for me. I signed at his request. I asked no questions. I had implicit confidence in his integrity. When signing any document, I usually ask what it is. I knew this was my income tax return. I knew that it had something to do with Central stock.

Return, 1937, received as Respondent's Exhibit T, without objection. [132]

(Testimony of Agnes C. Jacob.)

RESPONDENT'S EXHIBIT T

This Exhibit is the Income Tax Return of Agnes C. Jacob for the calendar year 1937. So far as here material, she reports as gain $4,750.13, from sale of twenty-four shares of capital stock of the Central Holding Company, which was on the basis of cost $151.17 and gross sales price of $4,750.13.

"Gift Tax" return, dated March 13, 1938, bears my signature. I simply signed it at Mr. Jacob's request, also, without inquiring as to the contents or what it was about.

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Received as Respondent's Exhibit U, without objection.

RESPONDENT'S EXHIBIT U

This is the Gift Tax Information Return filed by Agnes C. Jacob for the year 1937 in which she reports the gift to her of 24 shares of stock referred to in the Income Tax Return (Exhibit T).

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Cross Examination

I never saw this stock certificate before I received it by mail and endorsed it. I held it for a couple of days. I never saw it after I endorsed and sent it to Mr. Jacob. I mailed all the certificates signed by me and my children, as soon as we could.

I never received from the Central Holding Co.,

(Testimony of Agnes C. Jacob.)

James L. Conley, Barnes, or from Mr. Jacob, the sum of $4,901.30 or any sum of money purporting to come from the Central Holding Co.

I never received any money that represented the sale or other disposition of the stock of Central Holding Co.

Redirect Examination

I signed Income Tax Return because my husband takes care of my legal affairs. I signed at his request and on his advice. I don't remember even now, after looking it over, whether I knew it had reference to Central Holding Co. Stock. [133]

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Letter 1/25/38, received as Respondent's Exhibit V, without objection.

RESPONDENT'S EXHIBIT V

The Exhibit is as follows:

January 25, 1938

Mr. E. W. Barnes
4006 N. E. Hoyt St.
Portland, Oregon

Dear Sir:

I have your letter of January 24, 1938, which evidently was written for the express purpose of making evidence for yourself in support of some claim or contention which you intend to make or assert. Your statements as to what transpired between you and the undersigned are clearly erroneous and not in accordance with the facts. Of

(Testimony of Agnes C. Jacob.)

course, I have no knowledge concerning the conversations which you claim to have had with Mr. Conley.

With particular reference to your assertion that you did not receive my letter of August 18, 1937, this is an obvious attempt on your part to lay the foundation for an excuse for your failure to conduct your affairs in accordance with the suggestions contained therein. I know, positively, you received the letter because you talked with me about it on your first return trip from Burns after it was written.

I have not advised Mr. Conley or anyone else that I would make up "a statement showing that it is all right"; nor did I agree to make a statement of similar import, or of any character. I have no statements to make. The transaction wherein you acquired the stock of my family and myself and required my resignation as an *office* and director of the Central Holding Company was concluded upon the basis of figures and statements which were prepared by your own accountant and which were accepted by me without check or correction. Also, all of the funds received by the Company were handled by you and without any information as to where they came from nor how they were spent. The information and data respecting all of these matters undoubtedly is still in your possession.

Obviously I have no knowledge of the transactions of the corporation subsequent to the date when you acquired the stock from my family and

(Testimony of Agnes C. Jacob.)

myself and I submitted my resignation as above set forth.

I note you request that I give Mr. Conley the company's stock book and minute book. While it is true I was Secretary of the Company, I never kept these books in my possession, but they [134] were retained in the office of Mr. Conley, who organized the Company, prepared its articles and by laws, and all documents and minutes of such meetings as were held.

Yours very truly,
ROBT. T. JACOB

RTJ:RN
Registered

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Gift Tax Return admitted as Respondent's Exhibit W, without objection.

RESPONDENT'S EXHIBIT W

This Exhibit is the Gift Tax Return filed by Robert T. Jacob for the year 1937 and so far as here material it sets forth a gift of 24 shares of stock of the Central Holding Company to Agnes C. Jacob as follows:

"1. 24 shares Stock of Central Holding Co.
Love and Affection, Agnes C. Jacob
3206 S. E. Knapp, Portland, Oregon.....$4,901.30
2. 25 shares stock of Central Holding Co.
College Education, Gwendolyn E. Jacob,
3206 S. E. Knapp, Portland, Oregon..... 5,105.52
3. 25 shares stock of Central Holding Co.
College Education, Shirley May Jacob,
3206 S. E. Knapp, Portland, Oregon..... 5,105.52

(Testimony of Agnes C. Jacob.)

4. 25 shares stock of Central Holding Co.
College Education, Beverly Jean Jacob..... 5,105.52''

Attached to the Return is an affidavit reading as follows:

State of Oregon,
County of Multnomah, ss—

I, Robt. T. Jacob, being first duly sworn, depose and say: That failure to file the gift tax returns to which this affidavit is affixed within the time required by law, was not due to any intent to evade taxation or to avoid responsibility therefor, but in accordance with the facts set forth in connection with income tax returns filed concurrently herewith, it is my belief that the gifts were in fact made in 1936. Due to the fact that the stock was purchased in 1936 at a nominal consideration, its value was not sufficient to require the filing of a return in that year, but, should I be mistaken [135] in my position, and if the gift was not in fact consummated until 1937, then its value requires the filing of returns on Forms 709-710. Accordingly same are submitted herewith.

No extension of time for filing was requested as affiant was neither sick nor absent.

ROBERT T. JACOB

Subscribed and sworn to before me this 15th day of April, 1938.

.....

Notary Public for Oregon

My comm. Expires 7-27-41.

(Testimony of Agnes C. Jacob.)

Petition, answer, reply, decision of Board, Dec. 5, 1939 order of Board, April 9, 1940, memorandum, April 9, 1940, decision, April 10, 1940, and order, May 9, 1940, in docket 99161, "Robert T. Jacob, transferee vs. Commissioner of Internal Revenue", copies attached to petitions in the proceeding at bar, offered by petitioners, admitted without objection, Petitioners' Exhibit 6.

PETITIONERS' EXHIBIT No. 6

The petition, answer, decision of December 5, 1939 and order of the Board dated April 9, 1940 are not reproduced because attached to the petition in this cause. The reply, and the memorandum sur order dated April 9, 1940 and the order of the Board dated May 9, 1940 are as follows: [136]

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United States Board of Tax Appeals

Docket No. 99161

ROBERT T. JACOB (Alleged Transferee),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY

Comes now petitioner above named and, for reply to the further answer of the respondent, admits, denies and alleges as follows:

(Testimony of Agnes C. Jacob.)

1. Admits that respondent made an assessment against Central Holding Company, an Oregon corporation, of deficiencies in respect to the income tax and excess-profits tax in the respective amounts of to-wit: $3,930.34 and $1,382.16, together with penalties in the respective amounts of to-wit: $1,965.17 and $691.08, for its taxable fiscal year ending June 30, 1937, and except as herein specifically admitted, denies each and every of the allegations set forth in Subdivision (a) of Paragraph 7 of the further answer.

2. Admits that on or about March 3, 1939, respondent made an assessment against the Central Holding Company, an Oregon corporation, of deficiencies in respect of the income tax and excess-profits tax in the respective amounts of to-wit: $1,875.48 and $1,098.88 for the taxable fiscal year ending June 30, 1938, and except as herein specifically admitted, denies each and every of the allegations set forth in Subdivision (b) of Paragraph 7 of the further answer.

3. Denies the allegations in Subdivision (c) of Paragraph 7 of the further answer that demand was made in accordance with law upon the Central Holding Company for the payment of the alleged deficiency in tax, penalty, and interest, or that any demand was made at all prior to the assertion by respondent of liability on the part of the petitioner; denies that he has any knowledge or information sufficient to form a belief thereof as to the allegations in said Subdivision (c) that Central

(Testimony of Agnes C. Jacob.)

Holding Company has refused and still refuses to pay the alleged deficiency in tax, penalty, and interest, and alleges the fact to be that respondent did not, at any time prior to the assertion of any transferee liability against the petitioner, take any proceedings to collect the alleged tax, penalty, and interest from Central Holding Company; that during all of the time set forth in the said further answer, Central Holding Company was the owner and in possession of assets more than sufficient, and available, for the payment of the alleged tax, penalty, and interest, but respondent failed and refused to enforce the [137] payment of the alleged tax, penalty, and interest out of such assets at any time prior to the assertion of the alleged transferee liability against petitioner, or at all.

4. Denies each and every of the allegations set forth in Subdivision (d) of Paragraph 7 of the further answer.

5. Denies each and every of the allegations set forth in Subdivision (e) in Paragraph 7 of the further answer and alleges the fact to be that Central Holding Company did not, at the time set forth in said Subdivision (e) or at any time thereafter, become a liquidated corporation; that on August 17, 1937, and at all times thereafter, it continued to be a going corporation engaged in the hotel business; that it continued to be the owner of property and bought, owned and operated hotel property.

6. Denies each and every of the allegations set forth in Subdivision (f) of Paragraph 7 of the

(Testimony of Agnes C. Jacob.)

further answer and alleges the facts to be that at all the times set forth in the further answer, Central Holding Company was the owner and in possession of assets more than sufficient in value, and available, to the satisfaction of the alleged tax, penalty and interest assessed against Central Holding Company, out of which respondent could have enforced payment and satisfaction of the alleged tax, penalty and interest.

7. Denies each and every of the allegations set forth in Subdivision (g) of Paragraph 7 of the further answer.

8. Denies each and every of the allegations set forth in Subdivision (h) of Paragraph 7 of the further answer.

Wherefore, petitioner prays for judgment as demanded in the petition.

S. J. BISCHOFF

Attorney for Petitioner.

I hereby certify that I have prepared the foregoing copy of ..... and have carefully compared the same with the original thereof; and that it is a correct copy therefrom and of the whole thereof.

Attorney for

..... [138]

[Printer's Note: The memorandum sur order dated April 9, 1940, is not reproduced here, as it is part of Exhibit E, attached to the complaint, and is set out at page 44 of this printed record. The order of the Board dated May 9, 1940, is not reproduced here, as it is Exhibit

(Testimony of Agnes C. Jacob.)

F attached to the complaint, and is set out at page 54 of this printed record.]

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Stipulation entered in docket 99161 "Robert T. Jacob (transferee) vs. Commissioner", set forth in the memorandum sur order of the Board April 9, 1940, part of Exhibit E attached to the petition, admitted without objection, Petitioners' Exhibit 7.

PETITIONERS' EXHIBIT No. 7

This Exhibit is a stipulation entered of record during the trial of the proceeding before the Board of Tax Appeals, Docket #99161, entitled Robert T. Jacob (transferee) vs. Commissioner of Internal Revenue. The stipulation is set forth in full in the Memorandum Sur Order entered in said proceeding on April 9, 1940, which is a part of Exhibit 6.

[146]

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Commissioner's assessment certificate of tax against Petitioners for 1937, showing payment of tax, admitted without objection, Petitioners' Exhibit 8.

PETITIONERS' EXHIBIT No. 8

This Exhibit is entitled "Certificate of Assessments and Payments" from the office of Collector of Internal Revenue to the Commissioner of Internal Revenue, and shows the assessment of the tax

(Testimony of Agnes C. Jacob.)

against the Petitioners herein, in accordance with their returns filed by them for the calendar year 1937 showing payment of the said taxes by the Petitioners.

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Revenue Agent's reports refunding taxes paid by Petitioners on 1937 returns, admitted over Respondent's objections, as Petitioners' Exhibit 9.

PETITIONERS' EXHIBIT No. 9

This Exhibit consists of four reports by the Internal Revenue Agent and communication directed to each of the Petitioners herein determining an overassessment in the full amount of the tax paid by each of the Petitioners for the year 1937, which they paid in accordance with their returns for said year. Each of the reports addressed to the Petitioners recite:

> "The over assessment is due to an adjustment of the profit on Central Holding Company stock held to be the income of her father * * * Taxpayer is held to have received proceeds from liquidation of Central Holding Company's stock as a gift rather than gift of stock certificate."

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Income Tax Return of Robert T. Jacob, 1937, received Petitioners' Exhibit 10, without objection.

(Testimony of Agnes C. Jacob.)

PETITIONERS' EXHIBIT No. 10

This Exhibit consists of the Income Tax Return of Robert T. Jacob for the calendar year 1937. In this Return, Robert T. Jacob reports as revenue, gain of $19,792.19, resulting from disposition of 100 shares of stock of the Central Holding Company. Cost or other basis being $629.91 and gross sale price being $20,422.10. Attached to said return is a statement in writing which is set forth in full in the opinion of the Board.[147]

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Commissioner's report of assessment and payment of tax by Robt. T. Jacob for 1937 received, Petitioners' Exhibit 11, without objection.

PETITIONERS' EXHIBIT No. 11

This Exhibit is entitled "Certificate of Assessments and Payments" issued by Collector of Internal Revenue to the Commissioner of Internal Revenue, showing the assessment of tax against Robert T. Jacob in accordance with his return for the year 1937, and the payment of said tax by him.

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ROBERT T. JACOB

called by Petitioners, testified:

Direct Examination

I have been an attorney and tax consultant for

(Testimony of Robert T. Jacob.)

about 20 years; husband of Agnes C. Jacob; father of Shirley, Beverly and Gwendolyn Jacob. Was a stockholder, officer and an organizer of Central Holding Co. with Conley and Barnes. Was to have 1/3, or 100 shares of stock when company organized. It was organized for purchase of Welcome Hotel, Burns, Oregon. In contemplation of organization of that corporation, I promised to dispose of its stock to the members of my family. Told them we were planning to acquire the property, and I would give each a portion of the stock. At the inception, a certificate for 100 shares was issued to me; certificates to Conley and Barnes for 26½ and 73½ shares each. I did not transfer the 100 shares that were issued to me at that time to members of my family. The reason was, I provided the funds for the cash payment; Robert S. Farrell supplied $15,000 and I supplied the balance. Farrell imposed as a condition to providing $15,000, I should retain control. My agreement with Barnes and Conley was we should each hold one-third of the stock; to meet Farrell's requirements, each of the other incorporators delivered me 26½ shares. I retained those shares with my 100 until Farrell was paid.

The fire occurred July 15, 1937. Immediately thereafter, Conley went to Burns; on his return, he stated Barnes was already making plans to rebuild the hotel, and [148] wanted to acquire the stock of Conley and myself. Conley stated he informed Barnes he would turn over his stock, and wanted to know if I would. I said I was desirous of getting

(Testimony of Robert T. Jacob.)

out and would turn my stock over to Barnes. Barnes came to Portland, a few days later and told me Conley would turn over his stock to him; stated he wanted to continue the operation; that he planned to rebuild the hotel, and he had to be on the ground to make estimates of cost; he was planning a new hotel, and wanted to keep the corporation alive because it would be easier to obtain loans and refinance construction of the building, if he did so, and wanted to know if he could take me out and acquire my stock if I didn't want to go ahead. I said I didn't and then he said he would take me out if I would transfer my stock to him. At that time, he told me he was making arrangements with the First National Bank of Portland for a loan of $60,000; That he had made arrangements with the Hines Lumber Company to supply the lumber and materials at wholesale price, for completing the hotel. He stated he could get all the money he needed to finish the Pondosa Hotel.

It was then agreed he was to take me out, and he was to continue the corporation. I did not know how the insurance money was received or handled. Payment to me of $2,400.00 was made after Barnes and I had come to a conclusion that I was to transfer my stock to him. After I received $2,422.10, I gave no part of it to Agnes C., Shirley, Beverly or Gwendolyn Jacob. I didn't put any of it in a special fund for them. I utilized it for my own purposes.

Sometime between July 26 and July 31, I had

(Testimony of Robert T. Jacob.)

Miss Alstrom prepare certificates of one share to me, 24 to Mrs. Jacob and 25 to each of the girls. I took them into Conley's office and handed them to Barnes, who signed them. I retained one certificate and some time after August 1st, sent the others to Seaside, Oregon for endorsement by various members of the family. They were endorsed as of August 10, and returned. I retained them in my possession until August 17, when I delivered them to Barnes. I remember very distinctly that at the time I was paid $18,000, I handed these five stock certificates, with my resignation as treasurer and director to [149] Barnes. I did not participate in the adjustment of the insurance loss, which resulted in the last distribution. I knew approximately when it was received. I was informed by Barnes and Conley August 17 to come to First National Bank and I would be paid some $18,000. I went there, met Barnes and Conley, was handed $18,000, surrendered the stock certificates with my resignation to Barnes, took the $18,000 and left. Both Conley and Barnes were there when I left. I gave no part of that money to any member of my family, Agnes C., Beverly, Shirley or Gwendolyn Jacob. I did not give them any equivalent of the money, either in the form of bank deposits or other equivalents. I did not set it aside or deposit it in any trust fund or other account for them. I used it for my personal needs. I never conveyed any property of any kind to any of them in lieu of that money.

When I made gift returns for members of my

(Testimony of Robert T. Jacob.)

family, I embodied my reasons in statement attached to the return. There was a question in my mind as to the completion of the gift, and I wanted to comply with whatever requirements were necessary, so I made my return and under it I made the explanation.

My reason for reporting the same money both by myself for the full amount and by members of my family for the proportionate amounts, is covered by the statement attached to the return. I wasn't sure whether the gift had been completed, or what the legal effect was; and wanted to make a full disclosure and have the matter adjusted and determined. The statement I referred to is attached to my income tax return for 1937.

My reason for not giving my family the money as I intended to give them an interest in a going concern in the form of stock. The question of making them gifts of cash was not within my purpose, and I felt that would be unwise.

**Cross Examination**

Practicing attorney in Portland about 20 years. Member of Oregon Bar, engaged on income tax matters before the Bureau of Internal Revenue, Board and Federal Courts. Was in office of Collector at Portland, about 5 years. Authorized to practice before [150] the Bureau 1924, admitted to practice before the Board and the Bar in 1926.

I promised to give my family 100 shares of stock about June, 1936. Loan to Mr. Farrell was repaid during July, 1937, when I caused certificates to be

(Testimony of Robert T. Jacob.)

prepared in accordance with the intention of making the gift to my family.

Under the arrangements with Mr. Farrell, I was to retain the stock and control the corporation. I considered that required me to own the stock in my own right. Never considered I was the beneficial owner of Barnes and Conley's stock. Never considered I was the beneficial owner of the stock promised my family, but it was my purpose to consider my family beneficial owners.

After the fire on July 15, 1937, Barnes stated he wanted to acquire my stock and wanted to continue the operation of the corporation. It is not a fact that Barnes didn't want to continue the corporation. He told me specifically he wanted to keep the corporation alive, particularly for the convenience in borrowing money. When Barnes said he wanted to acquire the stock, neither he nor Conley mentioned wanting to continue the corporation for saving taxes, but Conley said Barnes wanted to rebuild, and wanted both of us to turn our stock over to him.

There was no arrangement between Barnes, Conley and me to divide the cash. Barnes and Conley acquired control and went ahead without consulting me anyway, disposed of the assets and collected the insurance, and handled the matters as they saw fit. Barnes said he wanted to take me out. I am positive Barnes used the phrase he wanted to "take me out", and I interpreted the transaction as constituting a sale by me of the stock to Barnes.

(Testimony of Robert T. Jacob.)

Barnes sold some timber in 1937 for $11,000 cash. I didn't know that the payments I received came from the proceeds of the insurance. I assumed they were but had no way of knowing. The money Barnes gave me was part of his agreement to take me out of the corporation, and I did not know that Conley or Barnes was getting an equal amount. The fact that at the moment I delivered the shares to Barnes, I received $18,000, led me to interpret it as payment for my stock. [151]

Barnes was in Burns on the 18th. He left on the afternoon of the 17th for Burns, after I delivered the stock and my resignation to him.

The Member: How do you know that?

The Witness: I recall his saying that he was going to Burns as quickly as he could, and I recall Mr. Conley coming in with respect to his share either on the afternoon of the 17th or the afternoon of the 18th; and I addressed a letter to Mr. Barnes in Burns on the afternoon of the 17th. I did not see Mr. Barnes leave for Burns or elsewhere on the 17th. I only know that he said on the morning of the 17th that he was anxious to get matters straightened out, and that he had to go that afternoon.

I testified on direct examination that none of the funds that I received was paid to any of the Petitioners; that in no shape, form or fashion did any of these funds reach those individuals, or were made available to them. Under those circumstances, I prepared the income tax returns of my wife and

(Testimony of Robert T. Jacob.)

daughters and reported the same thing both ways because there was a question in my mind. There was attached to the gift tax return an affidavit and a statement attached to the income tax return indicating I had a question in my mind as to whether a gift had been made or not. That was the only explanation I had to make, I think it is complete.

I prepared income tax return of Central Holding Co. for fiscal year June 30, 1937, and the paper attached to it.

Thereupon, questioning by Mr. Pigg continued.

Q. I call your attention to a paragraph in the statement. Your Honor, may I have your indulgence to read that paragraph? The first paragraph of this statement attached to the return reads as follows:

> "We severally owned and operated the Welcome Hotel, at Burns, Oregon, from July 1, 1936 to July 15, 1937, on which latter date the hotel was completely destroyed by fire. Due to the fact that the hotel was filled with guests, it was necessary for the clerk to act quickly in notifying the guests in vacating the premises, the fire having broken out about 4:30 in the morning. By the time the guests had been notified and assisted [152] from the building, the smoke had so completely filled the lobby and the office, that it was impossible to save any of the records, all of which, including the day books, expense bills, receipted bills, corre-

(Testimony of Robert T. Jacob.)

spondence and other records, were all completely burned."

That ends the quotation.

A. Yes.

Q. Isn't it a fact that at the time you filed the return under oath, you knew that to be not true?

A. No, that is not a fact. All the records that were in the hotel were destroyed.

Q. Isn't it a fact that the accounting records of the hotel were kept in your office in Portland?

A. Yes, a tabulation of the receipts and disbursements were. Those are the only records that we kept in my office, with the exception of weekly sheets that were forwarded, that is, the bi-monthly receipts that were forwarded, and from which the bookkeeper prepared the tabulation of receipts and disbursements.

Q. Isn't it a fact that the receipted bills and the invoices were copied off of the day book sheets that were kept in Burns, Oregon, and they were sent to you in Portland, Oregon, under your instructions, twice a month?

A. There were tabulations of receipted expenditures forwarded to my office twice a month under a system of accounting which was installed by Harry Byers, a certified accountant. These sheets, as they were received, were transmitted to the bookkeeper, and she prepared reports from them; and she prepared the cash book records for them. The Clerk on duty is the man who sent them in.

(Testimony of Robert T. Jacob.)

He was under Mr. Barnes. Barnes was the active manager at Burns. Mr. Barnes was the directing head of the organization at Burns.

Q. Mr. Jacob, isn't it a fact that you know now, and that you knew then, when the 1937 return was filed, that none of the records of Central Holding Co., excepting perhaps, or with the exception of some data with respect to the last two weeks pre-
[153] ceeding the fire, were destroyed, which had nothing to do whatsoever with the preparation of the return?

A. No, that is not a fact. That is, all the records, the checks and the vouchers, and all the bank account records,—and that is the basis for the compiling of an income tax.

Q. I will hand you a group of papers, which are invoices and receipted bills and tabulations, and various other sheets which speak for themselves, and they bear various dates in 1937 and 1936, and I will ask you whether or not it is a fact that those are the receipts and receipted bills and statements and papers which you required to be sent from Burns?

A. I have no way of knowing what was forwarded to my office. I didn't keep the books at all, but simply turned over the envelopes containing the statements and other data to the bookkeeper for entry.

Q. (Mr. Pigg, continuing): Are you inferring by that, they were not received by your office?

(Testimony of Robert T. Jacob.)

A. No, I don't know that they were not, and I don't know that they were.

Q. Do you testify that they were not?

A. No, I don't testify that they were not. I say I don't know.

Q. With your knowledge of the accounting affairs of the corporation, wouldn't you think that they were the records that were received at your office from Burns?

A. I don't recall. I have not seen them for some two or three or four years. That letter dated August 6, 1936, bears my signature, addressed to Mr. E. W. Barnes, care of Welcome Hotel, Burns, Oregon. It relates to the affairs of the Welcome Hotel.

Mr. Pigg: I offer it in evidence.

Mr. Bischoff: We object to is as incompetent, irrelevant and immaterial; and improper cross examination; it is an attempt to inject into the case a collateral issue, which will take considerable time to develop and rebut, for which we are not [154] now prepared. The subject matter involves solely the income tax of the corporation itself, as to which there is no issue now. It was an issue in a previous proceeding, and there is a long record dealing with the matter, which indicates how extensive an examination is necessary to understand what happened with respect to the records, which cannot be dealt with under the guise of an unexpected cross examination; and it would be highly prejudicial to the Petitioners, and they would be jeopardized by

(Testimony of Robert T. Jacob.)

entering into an investigation of an issue that is tendered by the attorney for the Government by such a question. It certainly has nothing to do with any issue that has been suggested by the pleadings.

Mr. Bischoff: All of this deals solely with the reason for the making of the return in 1937 for the corporation itself in the manner in which it was made, which, of itself, is an involved issue which must have to be tried so as to present the proper picture to the Court, and it cannot be done by cross examination. Since it is absolutely immaterial, and since that matter has already been tried out, it is certainly highly prejudicial and improper.

Mr. Pigg: This letter relates to the very transactions that are involved here. It is a letter addressed by this witness to Mr. Barnes, one of the preceding witnesses in this case. It deals with the question I have been examining the witness about, relating to the manner in which the records of Central Holding Co. were kept, and when, where and by whom. It is offered for the purpose of impeaching the testimony of this witness. It is not offered for showing anything with reference to the manner in which the income tax was filed in 1937, but is only offered for the purpose of impeaching the testimony of this witness.

The Member: The objection is overruled.

Mr. Bischoff: Note an exception.

Letter received as Respondent's Exhibit Z. [155]

(Testimony of Robert T. Jacob.)

RESPONDENT'S EXHIBIT Z

August 6, 1936

"Mr. E. W. Barnes,
c/o Welcome Hotel,
Burns, Oregon

Dear Ed:

Your letter of the 4th regarding the hotel reports: It will be in order for Mr. Heath to make the reports the 10th, 20th and last of the month.

I have not forwarded forms for the reason that I have not yet decided the exact manner in which I desire these made. I am studying the present set-up with the view to a more comprehensive statement for each period and do not care to have the forms printed until I know what I want. Therefore, instruct Mr. Heath to forward the reports as heretofore until otherwise advised. I am enclosing herein statement from the Title & Trust Co. covering the cost of the abstract and ask that you forward check to their order for at least $100.00. I observe that you have made payment to the Harney County and also have paid Caldwell's charge.

I notice in the petty cash receipts, an item of $20.00 to you for "carpenter and miscellaneous supplies $20.00." In connection with this and the checks which have been issued to you personally, it will be necessary that we keep a

(Testimony of Robert T. Jacob.)

detail, else the federal government will not recognize the deductions. In the matter of miscellaneous expenditures it would be far better for these to be paid by the manager, both from the standpoint of accounting and for its effect upon the manager. As to your own personal expenses, these should be detailed as in the case of the itemized bills submitted by Mr. Conley and myself. Your statement should show the date of the expenditures and who for, whether for gasoline, meals, car storage, oil, or whatnot. It will be absolutely necessary that this be done in order that the deduction be allowed by the Treasury Department in making our income tax returns, and the saving in tax on such items will be very substantial.

Yours very truly,"

---

Schedule marked and received in evidence as Respondent's Exhibit CC over Petitioners' objections.

Not reproduced because deemed not material on this appeal.

I executed under oath the affidavit Exhibit DD.

Mr. Bischoff: I will object to that as incompetent, irrelevant and immaterial, and improper cross examination. It has nothing to do with the issue presented here. [156]

The Member: The objection is overruled.

Mr. Bischoff: Note an exception, please.

The Member: Noted.

(Testimony of Robert T. Jacob.)

Affidavit received as Respondent's Exhibit DD.

RESPONDENT'S EXHIBIT DD

State of Oregon
County of Multnomah—ss.

I, Robt. T. Jacobs, being duly sworn, depose and on oath set forth in response to request of Revenue Agent Geo. L. Machin, the facts respecting the acquisition and gift of the stock of the Central Holding Company to Agnes C. Jacob, Gwendolyn E. Jacob, Shirley May Jacob and Beverly J. Jacob, and in order to set forth the facts as clearly as possible they will be detailed in narrative form:

Some time during the month of May, 1936, I approached James L. Conley and E. W. Barnes, who advised that the said Barnes held an option to purchase what was known as the "Welcome Hotel" located in Burns, Oregon. The information given me was that the said Barnes had acquired the option some two years previously and that under its terms a cash payment of $15,000 was required; that if I would procure said $15,000 I would be given a one-third interest in the equity that would be acquired in said property. Thereafter, and on or about May 26, 1936, I approached Mr. Robt. S. Farrell and after fully discussing the matter and after agreeing to further secure the said Farrell by giving him a mortgage upon certain properties then owned by me, in addition to giving a mortgage upon the Burns property, he agreed to furnish said money.

(Testimony of Robert T. Jacob.)

However, as will be seen from the letter received from Mr. Farrell, under date of May 27, 1936, one of the conditions precedent to his making the advance was that the undersigned retain 51% of the equity in the property described. The following is an exact copy of said letter:

"May 27, 1936

"Mr. Robt. T. Jacob,
Portland, Oregon.

Dear Sir:

"Confirming our verbal understanding, I will loan you and your associates the sum of $15,000.00 on the Welcome Hotel at Burns, Oregon, upon the following conditions:

"(1) That deed to the property will be delivered in escrow showing title in the undersigned, subject to a maximum mortgage of $27,000.00 bearing interest at 5½% per annum, interest payable semi-annually, and providing that no payment is to be made on the principal of said first mortgage for a period of eighteen months after the execution of said mortgage. [157]

"(2) That title policy will be issued showing title in the undersigned subject only to the first mortgage as set out in paragraph numbered (1).

"(3) That you own at least 51% of the equity in the property above described.

"(4) That you deliver to me a first mort-

(Testimony of Robert T. Jacob.)

gage on your property at Bonneville and Seaside.

"I will execute to you and your associates, an option to repurchase said hotel property upon the payment, at the rate of $1,000.00 per month, of the money advanced by me under this agreement, it being understood that the contract will provide for the payment to me of interest at the rate of 8% per annum upon the unpaid balances of said contract from month to month.

"You are advised that upon your written instructions, I will place the money in escrow in the First National Bank of Portland, Oregon to be paid through the Title & Trust Company upon delivery to them of the documents as provided above."

"Yours truly,
(Sgd) ROBT. S. FARRELL"

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After receipt of this letter, the matter was discussed with said Barnes and Conley and an agreement was reached whereby I was to hold the required interest until the mortgage of the said Farrell had been fully paid and satisfied.

After the arrangement above referred to was completed with the said Farrell, the said Barnes notified D. V. Kuykendall, the business agent for the owner of the property, that he was ready to

(Testimony of Robert T. Jacob.)

perform under the terms of his contract, but upon refusal of the said Kuykendall to transfer the property to Barnes, he thereupon threatened suit for specific performance. Thereafter, the said Kuykendall came to Portland, and the undersigned and the said Conley had a meeting with the said Kuykendall, who stated that he did not recognize Barnes' contract but that he was ready, willing, and able to transfer said property upon the payment of $18,000.00 and the assumption of taxes and liens outstanding. Thereupon the undersigned personally furnished $3,000.00 and with the $15,000.00 procured from the said Farrell, the purchase of the property was concluded.

As was set forth in statement attached to the income tax return filed for the year 1937, I promised the shares of stock to the members of my family very shortly after I acquired them, it being the expectation that the mortgage to the said Farrell would be repaid within a short time and the returns from the operation of the hotel would provide a substantial income, and I expressed the hope at that time that these returns would provide a fund for college educations for my daughters. This matter was discussed with Conley and Barnes, who made a similar distribution of their holdings. [158]

At the time of filing my return for 1936, I considered the question of filing a gift tax return but determined that one was not required: first, because the stock at the time of the promised gift had no value in excess of its cost, in view of the fact that

(Testimony of Robert T. Jacob.)

Kuykendall, from whom the property was purchased, did not recognize the option of the said Barnes, but it was acquired upon the basis of a new bargain between a seller, willing, but not forced to sell, and a buyer, willing, but not forced to buy; second, because the gift had not been completed by the physical delivery of the certificates.

The Burns hotel representing the property owned by the Central Holding Company, burned on July 15, 1937. Shortly thereafter the said Barnes and Conley arranged for a loan at the United States National Bank at Portland, Oregon, from the proceeds of which the mortgage of the said Farrell was paid on July 27, 1937. Thereupon the undersigned delivered to the said Barnes and Conley the shares of stock which were being held by the undersigned under an agreement to return them when the said Farrell mortgage and interest thereon had been fully satisfied, and which then gave the said Barnes and Conley the ownership of 66 2/3% of the stock, and corresponding control of its affairs. Immediately upon the release of this stock, and satisfaction of the obligation imposed by the said Farrell, I caused certificates of stock to be issued to the members of my family. They were at the time in Seaside, Oregon, and the certificates after issue were forwarded to them at that place. In the mean time, the said Barnes had insisted that the stock be turned over to him and an agreement had been reached to deliver it to him. In pursuance of this arrangement, on August 10, 1937, each of the

(Testimony of Robert T. Jacob.)

owners of the certificates endorsed the same, had their signatures witnessed and then the shares were forwarded to me for delivery to Barnes upon receipt of the money therefor. On August 18, the final payment of $18,000 was received by the undersigned in cash, in the safety deposit vaults of the First National Bank of Portland, and at that time the undersigned delivered to the said Barnes 100 shares of the stock of the Central Holding Company, represented by certificates as follows:

Certificate No. 1, Robert T. Jacob, 1 share
Certificate No. 5, Agnes C. Jacob, 24 shares
Certificate No. 6, Gwendolyn E. Jacob, 25 shares
Certificate No. 7, Shirley May Jacob, 25 shares
Certificate No. 8, Beverly J. Jacob, 25 shares

At the time of delivery of said shares for the said moneys, I also delivered to the said Barnes a letter as follows:

"August 17, 1937

"Mr. E. W. Barnes, President
Central Holding Company
Portland, Oregon

Dear Ed:

"Inasmuch as you have acquired the stock of the undersigned, Mrs. Jacob, and the girls, I have no further interest in the Central Holding Company, and accordingly, submit my

(Testimony of Robert T. Jacob.)

[159] resignation as director and secretary, effective at once."

"Very truly yours
(Sgd) ROBT. T. JACOB"

RTJ:RN

Subscribed and sworn to before me this 29 day of November, 1938.

.....

Notary Public for Oregon
My commission expires:....

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I executed under oath the affidavit, Exhibit EE.

Mr. Pigg: I will offer this document in evidence, your Honor.

Mr. Bischoff: May I have the same objection on the last exhibit?

The Member: The objection is overruled. It will be marked in evidence as Respondent's Exhibit EE.

Mr. Bischoff: Note an exception.

The Member: Noted.

Affidavit, admitted as Respondent's Exhibit EE.

RESPONDENT'S EXHIBIT EE

State of Oregon
County of Multnomah—ss.

AFFIDAVIT

I, Robert T. Jacob, being first duly sworn, depose

(Testimony of Robert T. Jacob.)

and on oath set forth at the request of Geo. L. Machin, Internal Revenue Agent, the following facts respecting the sale of myself and family of the stock in the Central Holding Company.

During the month of May, 1936, I was informed that one E. W. Barnes held an option to purchase the "Welcome Hotel" at Burns, Oregon, for a cash payment of $15,000 and the assumption of certain taxes and liens, and I was offered by the said Barnes and James L. Conley a one-third interest in the equity to be acquired, in consideration of my procuring a loan of $15,000 to make the cash payment. Arrangements were made with one Robt. S. Farrell to supply said $15,000, but he required the undersigned to retain 51% of the equity in the [160] property until his mortgage and interest had been fully paid.

During the month of June, 1936, the Central Holding Company, an Oregon corporation, was organized, with 300 shares of no-par stock, and this corporation, on July 1, 1936, acquired the "Welcome Hotel" at Burns, Oregon. In order to meet the conditions imposed by the said Farrell, at the time of the incorporation of the above named company, and to comply with the agreement with the said Barnes and Conley, each of them assigned to affiant 26½ shares of their stock in said Central Holding Company, on condition that this stock should be returned to them when the Farrell loan was liquidated.

At the time the corporation acquired said prop-

(Testimony of Robert T. Jacob.)

erty, said Barnes took complete charge as manager of the hotel and operated the same until July 15, 1937, collecting the rents, paying the expenses, and keeping the operating records, when a fire occurred which destroyed the building and its contents, with the exception of the foundation, walls, and the heating plant (housed in a separate wing of the building), which remained intact, undamaged.

Prior to the time of the acquisition of the above referred to property, the said Conley and Barnes had been associated together for many years in various enterprises and also in the relationship of attorney and client, and their relations were very intimate and close. During the time the hotel was operated by the said Barnes, I complained of his extravagances and other matters which resulted in friction and unpleasantness between us, and as a result there was little communication between us. When the fire occurred I was neither consulted nor permitted to enter into the negotiations or the transactions in connection with the settling up of the company's affairs.

Almost immediately after the fire occurred, the said Conley and Barnes arranged to borrow money at the United States National Bank of Portland, Oregon, to pay the balance to Robt. S. Farrell, and for other purposes of which I was not advised. The first intimation I had that such a loan was negotiated was when I was requested as secretary to sign the note and resolution authorizing the loan.

(Testimony of Robert T. Jacob.)

The loan was obtained by them so that they could reacquire the stock which they had transferred to me as aforesaid, and between them obtained and exercised control. The payment to the said Farrell was made on or about July 27, 1937, some 12 days after the fire occurred, from the proceeds of said loan. Upon the repayment of Farrell's loan, demand was made upon me by the said Barnes and Conley for the surrender to them of the shares which I held as aforesaid. These shares were surrendered and the control of the company's affairs then vested completely in the said Barnes and Conley. As above stated, I was not consulted as to what was being done in connection with the corporation's affairs and I knew nothing of the details thereof. As to the insurance funds which were realized by reason of the fire, I knew nothing of the details. Conley and Barnes conducted all negotiations in adjusting the fire insurance losses.

Shortly after the fire, I was approached by the said Barnes who stated that it was his purpose to rebuild the Welcome Hotel, but that he could not do so unless he could acquire all of the stock of the said Central Holding Company. He thereupon approached me as to the acquisition of the stock of myself and family and I informed him that it would be surrendered upon the payment to us of $21,500, and he agreed to buy the stock for that amount. [161] Nothing more was said regarding this proposition until on or about August 12, 1937, when Barnes handed me $2,422.10, and stated that

(Testimony of Robert T. Jacob.)

the balance would be paid later. On August 16, 1937, he informed me that he had had a statement prepared by his auditor, John McGrath, which statement as I recall, showed that all bills of the company had been paid and the said Barnes stated that he would pay us a balance of $18,000 for our stock holdings in the said Central Holding Company, whereupon I advised him that this amount was over $1,000 less than the amount we had agreed to accept. He argued that by his carrying on the company, rebuilding the hotel and continuing its operations it would affect a saving in taxes to me which should be treated as a part of the consideration for the transfer of said stock, and after considerable argument this proposal was agreed to. On August 17, 1937, I was advised by the said Barnes to meet him and Mr. Conley in the basement of the First National Bank of Portland, Oregon. This I did and in the safety deposit department of the bank he paid me $18,000 in currency, at which time I delivered to the said Barnes certificates of stock of the Central Holding Company as follows:

Certificate No. 1, Robt. T. Jacob, 1 share.

Certificate No. 5, Agnes C. Jacob, 24 shares

Certificate No. 6, Gwendolyn E. Jacob, 25 shares

Certificate No. 7, Shirley May Jacob, 25 shares

Certificate No. 8, Beverly J. Jacob, 25 shares

In response to a previous request I had prepared

(Testimony of Robert T. Jacob.)
a resignation as as officer and director and I executed and delivered to him at that time the following letter:

"August 17, 1937

"Mr. E. W. Barnes, President,
Central Holding Company
Portland, Oregon

Dear Ed:

"Inasmuch as you have acquired the stock of the undersigned, Mrs. Jacob and the girls, I have no further interest in the Central Holding Company, and accordingly submit my resignation as director and secretary, effective at once."

"Very truly yours
ROBT. T. JACOBS"

RTJ:RN

Prior to the final closing of the matter, the said Conley, Barnes and the undersigned, discussed the matter of tax which might accrue to the Central Holding Company and during the discussion the said Conley requested that for future reference I embody my views in a letter. On August 18, 1937, I wrote and forwarded to the said Barnes at Burns, Oregon, a letter of which the following is a true copy, to-wit:

(Here follows letter which is Petitioner's Exhibit 4.) [162]

Nothing further transpired in connection with the matter until January 3, 1938, when I was re-

(Testimony of Robert T. Jacob.)

quested by Mr. Conley to furnish him with a copy of my letter of August 18, 1937, and said copy was furnished together with the following letter of transmittal:

"January 3, 1938

"Mr. James L. Conley
1312 Public Service Bldg.
Portland, Oregon

Dear Jim:

"As per your request, I am enclosing you herein a copy of my letter of August 18, 1937, written to Mr. Barnes, President of the Central Holding Company, and forwarded to him at Burns, Oregon. As stated to you, he mentioned having received the letter, but I am glad to forward the copy as per your request.

"As stated to you further, the matter of dissolving the corporation is one which is not material to me for the reason that Mr. Barnes, personally, acquired my family's stock and the matter of liquidation would be entirely up to him."

"Yours very truly
ROBT. T. JACOB"

RTJ:RN

Thereafter and on January 25, I received from the said Barnes the following letter:

(Here follows Petitioners' Exhibit No. 5.)

To which on the same date I replied as follows:

(Here follows Respondent's Exhibit V.)

(Testimony of Robert T. Jacob.)

I have no knowledge as to what disposition Mr. Conley or members of his family who owned stock made of their stock, but I know that Mr. Conley last acted as secretary of the corporation and he executed a mortgage on behalf of the corporation as such secretary, on December 15, 1937, upon Lots 8 to 15, Block A Denney's Addition to Arlington, Oregon, occupied by the Arlington Hotel which the corporation purchased on that date. This was a purchase-money-mortgage executed when the corporation bought that property. Prior to the acquisition of the hotel property at Arlington the corporation acquired a hotel and other property at Hines, Oregon, in Harney County, which is a suburb of Burns, Oregon, and I am informed that said property at Hines, Oregon, was traded in as part payment of the Arlington Hotel Property.

Also in the August 29th, 1937, issue of the Sunday Oregonian, appeared a cut of a hotel building in Section 2, Page 1, Volume LVI, under the headline "Welcome Hotel at Burns to be rebuilt at cost of $200,000.00". The following excerpts were from the accompanying article: [163]

> "The Burns property is owned by E. W. Barnes, who pioneered the timber development of that area. * * *
>
> " * * * Construction will get under way about September 15, it was announced here yesterday by Elmer O. Berglund, Superintendent of Avondale Construction Co., in charge of the reconstruction program."

(Testimony of Robert T. Jacob.)

The corporation with Barnes acting as the president and manager operated and continued the hotel in Arlington continuously until September 12, 1938, at which time the Central Holding Company conveyed the hotel property to E. W. Barnes and Olive G. Barnes, but the corporation was continued in existence.

Thus the corporation continued in existence and continued to function as such from and after the time that my family and I sold the stock to the said Barnes, and said corporation was during all of said time engaged in the business for which it was organized, owning, managing, and conducting hotel property.

(Sgd) ROBT. T. JACOB

Subscribed and sworn to before me this 30th day of November, 1938.

(Sgd) E. M. BETZNER
Notary Public for Oregon
My Commission Expires:
2/18/42

It absolutely is not a fact that the whole transaction under which or by which I surrendered my stock certificates to Barnes in the way the evidence shows, and under which I received this $20,000 in the manner the evidence shows, was calculated and designed by me merely to shift whatever tax might be due to the corporation and escape any tax to myself. Petitioners' Exhibit 4 contains instructions or the information I gave him respecting the handl-

(Testimony of Robert T. Jacob.)

ing of the monies which were obtained from the insurance funds.

Thereupon the following ensued:

Q. Now, as a tax practitioner of 20 years' experience and training, didn't you know then and don't you know now that the advice and instructions given in that Petitioners' Exhibit 4 were unworthy of a practitioner of repute?

A. No, it is not unworthy.

Mr. Bischoff: At this time I move to strike from the record all the cross examination pertaining to the preparation and the making of the income tax return of Central Holding Co. for the fiscal year ending June 30, 1937, and with respect to the,——[164]

The Member: June 30, what year?

Mr. Bischoff: June 30, 1937, and all the testimony with respect to the records and documents that were produced in connection with that examination on the ground that such examination is wholly immaterial, irrelevant and incompetent, and has nothing to do with any evidence developed on direct examination, nor is it proper evidence for the purpose of impeachment of the witness, and on the ground that it tendered an entirely collateral issue which the Petitioners in this case were not able at this time to properly meet.

The Member: The motion will be denied.

Mr. Bischoff: Note an exception.

The Member: An exception will be noted.

Petitioners offered testimony of Gregory Con-

(Testimony of Robert T. Jacob.)
nor before the Board proceeding document 99161, "Robert T. Jacob, Transferee, v. Commissioner." Received over objection, Pet. Exh. 12

PETITIONERS' EXHIBIT No. 12

This Exhibit consists of testimony of Gregory Conner referred to above. Printing omitted because not deemed material on this appeal.

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Recross Examination

I did not hand Barnes corporation return for fiscal year 1937, left it in Conley's office. The only thing I declined to sign is the statement that is in evidence. I was secretary-treasurer of the corporation, but not on September 15. I resigned August 17. It was not in my judgment, my duty and responsibility to check and verify the accuracy of the reports that were sent to Portland, to me from Burns. I didn't make an audit. My purpose was to have an audit at the end of each year; the books were opened by a CPA, and I had nothing to do with auditing the books.

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A certified copy of a proclamation of the Governor of Oregon dissolving Central Holding Co. by gubernatorial proclamation on January 6, 1941 for nonpayment of annual license fee, was received without objection, marked as Respondent's Exhibit FF.

[Endorsed]: T. C. U. S. Filed Feb. 2, 1943. [165]

[Title of Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States.

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit with reference to petition for review heretofore filed by the petitioner in the above-entitled cause a transcript of record in the said case prepared for transmitting as required by law and by the rules of said Court and to include in said transcript of record the following documents or certified copies thereof, to-wit:

1. The docket entries in all proceedings before the Tax Court of the United States, formerly the Board of Tax Appeals.

2. Pleadings before said Court.

   (a) Petitions for redetermination.

   (b) Answer of Respondent.

   (c) Reply.

3. Findings of fact and opinion of the Board of Tax Appeals.

4. The decision of the Board.

5. The petition for review filed by the petitioner herein.

6. The statement of evidence with exhibits.

7. Proof of service of the petition for review and the notice of filing the same.

8. Designation of Record. [166]

9. All orders extending time to file the transcript and docket the cause in the Circuit Court of Appeals.

10. This praecipe with proof of service thereof.

11. All other papers, records, documents and orders filed or of record in said cause except the transcript of testimony and exhibits for which statement of evidence is substituted.

W. J. BISCHOFF
Attorney for Petitioner

[Endorsed]: T. C. U. S. Filed Feb. 25, 1943.

[167]

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The Tax Court of the United States

Docket No. 108032

AGNES C. JACOB,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AFFIDAVIT OF SERVICE

State of Oregon,
County of Multnomah—ss.

I, S. J. Bischoff, being duly sworn on oath depose and say that I served a true and correct copy of the praecipe for record attached hereto by mailing the same to J. P. Wenchel, counsel for the respondent, addressed to him at the Internal Revenue Building, Washington, D. C.; that said copy of praecipe addressed as aforesaid with postage paid thereon was by me deposited in the United States

Post Office at Portland, Oregon, for mailing to the said J. P. Wenchel.

[Seal] (s) S. J. BISCHOFF,

Subscribed and sworn to before me this 22nd day of February, 1943.

(s) DOROTHY ORR,
Notary Public for Oregon.

My commission expires: 10/23/45.

[Endorsed]: T.C.U.S. Filed Feb. 25, 1943. [168]

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[Title of Court and Cause.]

## CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, B. D. Gamble, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 168, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 2d day of March, 1943.

[Seal] B. D. GAMBLE,
Clerk, The Tax Court of the United States.

ABSTRACT OF RECORD IN THE CASES OF

Docket Nos. 108033, 108034, 108035

Docket No. 108033

SHIRLEY MAY JACOB (Alleged Transferee),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 108034

BEVERLY JEAN JACOB (Alleged Transferee),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 108035

GWENDOLYN E. JACOB (Alleged Transferee),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

[Printer's Note: Docket Entries in the above cases are the same as set forth in the case of Agnes C. Jacob.]

The pleadings in the above entitled cases are the same as in the case of Agnes C. Jacob, Appellant,

vs. Commissioner of Internal Revenue, Appellee, except that appellants are designated as daughters of Robert T. Jacob and the transferee liability asserted against the appellants is the sum of $2805.92 income tax and $2299.60 excess profits tax, total $5105.52.

The four issues were consolidated for trial, involve the same fund and the same issues.

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[Title of Board and Causes.]

DECISION

The Decisions in the cases of Shirley May Jacob vs. Commissioner of Internal Revenue, Beverly Jean Jacob vs. Commissioner of Internal Revenue, Gwendolyn E. Jacob vs. Commissioner of Internal Revenue are the same as in the case of Agnes C. Jacob, except that the amounts set forth in said Decision are $2805.92 and $2299.60.

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[Title of Board and Causes.]

PETITION FOR REVIEW OF UNITED STATES BOARD OF TAX APPEALS DECISION

The Petitions for Review in the cases of Shirley May Jacob, vs. Commissioner of Internal Revenue, Beverly Jean Jacob vs. Commissioner of Internal Revenue, and Gwendolyn E. Jacob vs. Commissioner of Internal Revenue and the Notices of Filing of Petitions for Review in said cases are the same as

the Petition for Review in the case of Agnes C. Jacob, except that the petitioners are referred to therein as the daughters of Robert T. Jacob and the amounts of liability asserted against them are $2805.98 and $2299.60.

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[Endorsed]: No. 10390. United States Circuit Court of Appeals for the Ninth Circuit. Agnes C. Jacob, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Shirley May Jacob, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Beverly Jean Jacob, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Gwendolyn E. Jacob, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petitions to Review Decisions of the Tax Court of the United States.

Filed: March 15, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10390

AGNES C. JACOB,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SHIRLEY MAY JACOB,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BEVERLY JEAN JACOB,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

GWENDOLYN E. JACOB,

petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

## MOTION FOR AN ORDER AUTHORIZING CERTIFICATION AND FILING OF A CONSOLIDATED RECORD

Come now the petitioners above named and move this court for an order authorizing and directing the Clerk of the Tax Court of the United States to prepare, certify and file in this court a single consolidated record upon the petition for review filed by the above-named petitioners and for consolidation of the four cases in this court and for the pleading of a consolidated record in this court.

This motion is made for the following reason.

The pleadings before the Tax Court of the United States in all of the four proceedings referred to above are identical except that Agnes C. Jacob is described as the wife in one petition and the other three petitioners are described as daughters of Robert T. Jacob. All of the petitioners are claimed by respondent to be the transferees of the same identical fund. The issues of fact and law raised by the pleadings are identical in all the cases. The cases were consolidated for trial before the Tax Court of the United States and were tried simultaneously on a single record.

The court below rendered a single opinion. The issues to be tried in this court are identical in all four cases. The pleadings and records in each of those cases are very voluminous and no useful purpose could be served by reproducing all of the pleadings in the four proceedings in four separate records. Such a proceedure would unnecessarily encumber the record and subject the parties to un-

necessary expense and the parties and the Clerk of the court below to unnecessary labor.

Dated February 25, 1943.

S. J. BISCHOFF,
Attorney for Petitioners
Above-named.

---

[Title of Circuit Court of Appeals and Cause.]

ORDER FOR CONSOLIDATION

The petitioners above named having filed a motion herein for an order permitting the filing of a consolidated record on the petitions for review in said proceedings and directing the Clerk of The Tax Court of the United States to prepare, certify and file herein a single consolidated record and for consolidation of the causes in this court and for the pleading of a consolidated record in this court and it appearing that the consolidation of the proceedings and records can be made without prejudice to the rights of any of the parties and is in the interest of economy of time, labor and expense, it is

Ordered that the Clerk of The Tax Court of the United States be and he hereby is authorized and directed to prepare, certify and file in this court a single consolidated record on the petitions for review filed in the above-entitled proceedings; that the four proceedings be docketed in this court upon the filing of such consolidated record; that the proceedings be consolidated in this court for trial and that a single consolidated record be printed in this court.

Dated the 2nd day of March, 1943.

FRANCIS A. GARRECHT
Judge.

[Endorsed]: Filed Mar. 2, 1943. Paul P. O'Brien, Clerk.

[Endorsed]: Re-filed Mar. 15, 1943. Paul P. O'Brien, Clerk.

---

[Title of Circuit Court of Appeals and Cause.]

## DESIGNATION OF PARTS OF RECORD TO BE PRINTED

To the Clerk of the above entitled Court:

The appellants above named hereby designate for printing the following portions of the record to wit:

1. The Petition in the case of Agnes C. Jacob omitting the following parts thereof:

(a) Verification (page 16).

(b) The portion of the deficiency letter (page 17) dated April 8, 1941, addressed to Agnes C. Jacob, beginning with the phrase "in accordance with" and ending with the phrase "whichever is earlier."

(c) The portion of Exhibit A (page 20) beginning with the phrase "in accordance with" and ending with the phrase "whichever is earlier."

(d) The portion of Exhibit A beginning with the heading "Taxable Year Ended June 30, 1937" (page 22) and ending with the line "Deficiency of income tax . . . $1,875.48" (page 27).

(e) The portion of Exhibit B (page 28) beginning with the paragraph numbered "1." to and including the paragraph "(o)" (page 30), also portions of Exhibit B beginning with paragraph "5" (page 30) to the end of page 35.

(f) The caption and the portion of Exhibit C (page 36) beginning with the paragraph numbered "1." and ending with the paragraph numbered "3." on the same page.

(h) The portion of Exhibit C beginning with the paragraph numbered "5" (page 36) and ending with line five on page 39.

(i) The portion of Exhibit C beginning with the phrase "Wherefore, it is prayed" on page 39 to the end of that page.

(j) The portion of Exhibit D (page 40) which states the title of the Board and the title of the cause.

(k) All of Exhibit E (page 41.)

(l) All of Exhibit F (page 42).

2. The Answer in the case of Agnes C. Jacob vs. Commissioner (page 43) omitting the caption and verification and signatures.

3. The Reply in the case of Agnes C. Jacob vs. Commissioner (page 53) omitting the caption and signatures.

4. Omit printing of the pleadings in the cases of

Shirley May Jacob vs. Commissioner

Beverly Jean Jacob vs. Commissioner

Gwendolyn E. Jacob vs. Commissioner

and insert in lieu thereof the following statement:

Abstract of Record in the Cases of
Shirley May Jacob vs. Commissioner
Beverly Jean Jacob vs. Commissioner
Gwendolyn E. Jacob vs. Commissioner

The pleadings in the above entitled cases are the same as in the case of Agnes C. Jacob, Appellant, vs. Commissioner of Internal Revenue, Appellee, except that appellants are designated as daughters of Robert T. Jacob and the transferee liability asserted against the appellants is the sum of $2805.92 income tax and $2299.60 excess profits tax, total $5105.52.

The four cases were consolidated for trial, involve the same fund and the same issues.

5. Appellants' Statement of the Evidence, omitting therefrom the portions of the exhibits that are stricken therefrom.

6. The findings of Fact and Opinion of the United States Board of Tax Appeals (pages 127 to 153 inclusive).

7. The Decision of the United States Board of Tax Appeals (omitting the caption) in the case of Agnes C. Jacob vs. Commissioner of Internal Revenue.

(a) Omit printing of decisions in the cases of Shirley May Jacob vs. Commissioner of Internal Revenue, Beverly Jean Jacob vs. Commissioner of Internal Revenue, and Gwendolyn E. Jacob vs. Commissioner of Internal Revenue, and substitute therefor the statement as follows:

"The Decisions in the cases of Shirley May Jacob vs. Commissioner of Internal Revenue, Beverly Jean Jacob vs. Commissioner of Internal Revenue, Gwendolyn E. Jacob vs. Commissioner of Internal Revenue are the same as in the case of Agnes C. Jacob, except that the amounts set forth in said Decisions are $2805.92 and $2299.60."

8. Petition for Review in the case of Agnes C. Jacob vs. Commissioner of Internal Revenue (pages 155 to 162).

9. Notice of Filing of Petition for Review in the case of Agnes C. Jacob vs. Commissioner of Internal Revenue.

10. Omit the printing of the Petitions for Review and Notice of Filing of Petitions for Review in the cases of Shirley May Jacob vs. Commissioner of Internal Revenue, Beverly Jean Jacob vs. Commissioner of Internal Revenue, and Gwendolyn E. Jacob vs. Commissioner of Internal Revenue, and substitute in place thereof the statement as follows:

"The Petitions for Review in the cases of Shirley May Jacob vs. Commissioner of Internal Revenue, Beverly Jean Jacob vs. Commissioner of Internal Revenue, and Gwendolyn E. Jacob vs. Commissioner of Internal Revenue and the Notices of Filing of Petitions for Review in said cases are the same as the Petition for Review in the case of Agnes C. Jacob, except that the petitioners are referred to therein as the daughters of Robert T. Jacob and the amounts of liability asserted against them are $2805.92 and $2299.60.

11. Designation of Record to be prepared by the Clerk of the Tax Court of the United States.

12. The Docket Entries.

13. Statement of the Points on which appellants intend to rely on the appeal.

14. This Designation of Portions of Record to be Printed.

15. Motions and Orders for extensions of time to docket appeals if any there be.

S. J. BISCHOFF,
Public Service Building
Portland, Oregon

Service of a copy of the foregoing designation of parts of record to be printed is hereby admitted and accepted this 26th day of February, 1943.

J. P. WENCHEL
Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent on Review.

[Endorsed]: Re-filed Mar. 15, 1943. Paul P. O'Brien, Clerk.

---

[Title of Circuit Court of Appeals and Causes.]

COUNTERDESIGNATION BY RESPONDENT OF PORTIONS OF THE RECORD TO BE PRINTED.

To the Clerk of the above entitled Court:

The respondent above named hereby designates in writing the following additional parts of the record which he deems material and which he desires

should be printed as a part of the record upon review:

1. The portions of Exhibit B to the petition (before the Board of Tax Appeals) of Agnes C. Jacob beginning with paragraph "5" to the end of that paragraph.

2. The portion of Exhibit C to the petition (before the Board of Tax Appeals) of Agnes C. Jacob beginning with paragraph numbered "5" to the end of the prayer for relief, appearing in Exhibit C.

3. All of Exhibits E and F to the petition (before the Board of Tax Appeals) of Agnes C. Jacob unless the same are included and printed verbatim in the Statement of the Evidence which is being printed as a part of the record herewith.

SAMUEL O. CLARK, JR.
Assistant Attorney General.

Service of a copy of the foregoing Counterdesignation by Respondent of Portions of the Record to be Printed is hereby admitted and accepted this .....day of March, 1943.

.....
Counsel for Petitioners on Review.

[Endorsed]: Filed Mar. 10, 1943. Paul P. O'Brien, Clerk.

[Endorsed]: Re-filed Mar. 15, 1943. Paul P. O'Brien, Clerk.

No. 10390

# In the United States
# Circuit Court of Appeals
## For the Ninth Circuit

AGNES C. JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

SHIRLEY MAY JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

BEVERLEY JEAN JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

GWENDOLYN E. JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

## PETITIONERS' BRIEF

On Appeal from the District Court of the United States for the District of Oregon.

S. J. BISCHOFF
Public Service Building
Portland, Oregon
*Attorney for Petitioners.*

FILED
MAY - 3 1943
PAUL P. O'BRIEN,
CLERK

STEVENS-NESS LAW PUB. CO., PORTLAND

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No. 10390

# In the United States
# Circuit Court of Appeals
## For the Ninth Circuit

AGNES C. JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

SHIRLEY MAY JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

BEVERLEY JEAN JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

GWENDOLYN E. JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

## PETITIONERS' BRIEF

On Appeal from the Circuit Court of the United States for the District of Oregon.

## STATEMENT AS TO JURISDICTION OF THE TAX COURT OF THE UNITED STATES AND THIS COURT.

On April 8, 1941, respondent mailed to petitioners notices of intention to assess against Agnes C. Jacob an income tax of $2693.68 and excess profits tax of $2207.62, and against each of the other three petitioners income tax of $2805.92 and excess profits tax of $2299.60 as "transferees or transferees of a transferee" of assets of Central Holding Co. (taxpayer) (Tr. pp. 19-20). Said proceedings were instituted under **Section 311(a)(1) of the Revenue Act of 1936.**

On July 2, 1941, petitioners filed with the Tax Court of the United States their petitions for review of the liabilities assessed against them. (Tr. pp. 3 to 55.)

On October 2, 1942, the Tax Court made and entered its final decisions in said proceedings in favor of the respondent (Tr. p. 102).

On December 28, 1942, appellants filed with the Tax Court of the United States their petitions to review the said decisions (Tr. pp. 103-112) and notice of filing of said petitions was duly given to respondent on December 28, 1942. (Tr. p. 112)

Jurisdiction to hear and determine said petitions for review is conferred on this court by **Title 26 U.S.C. A., Sec. 1141.**

## STATEMENT OF THE CASE AND QUESTIONS INVOLVED

Central Holding Co., a corporation (taxpayer) was the owner and operator of a hotel at Burns, Oregon. It became liable for $6,007.82 plus interest for income tax for the fiscal year ended June 30, 1938. It filed its return September 15, 1938 but failed to pay the tax disclosed thereby.

These transferee proceedings were instituted against petitioners to impose upon them liability for that tax on the alleged ground that they were transferees of assets of the corporation.

Respondent contends that petitioners (wife and daughters of Robert T. Jacob) were stockholders of the taxpayer and as such are transferees of a fund ($20,422.10) alleged to have been **received for them by Robert T. Jacob** on August 12 and August 18, 1937, as a liquidating dividend and that the corporation was rendered insolvent.

Petitioners contend (1) that they never became stockholders of the corporation; (2) that Jacob was at all times the stockholder; (3) that he received and retained the fund as his own; (4) that he had merely promised to make a gift of stock (not the fund derived from its disposition) to them but never consummated the gift and abandoned his purpose and intention; (5) that he did not receive the fund at their request or with their knowledge or for them; (6) that he never turned

over the fund to them, directly or indirectly or set it apart for them or held it in trust for them; (7) that Jacob did not receive the fund from the taxpayer as a liquidating dividend or at all, but **received it from E. W. Barnes** in payment for his stock in the corporation which he sold to Barnes; (8) that the taxpayer did not become a liquidated corporation. It was not dissolved but continued in existence and to function and operate as such and bought and operated hotel property thereafter; (9) that the corporation was not rendered insolvent; (10) that respondent did not exhaust his remedies against the taxpayer before instituting these transferee proceedings and if he had done so the tax liability could have been satisfied out of assets of the corporation.

Petitioners also contend that respondent is now estopped from asserting that they are transferees of that fund (assuming that it was a liquidating dividend), **first,** by reason of a prior determination **made by the respondent** that petitioners were not the transferees and that Robert T. Jacob was the transferee and, **second,** by a prior determination made by the Board of Tax Appeals in a transferee proceeding prosecuted against Jacob in which the respondent contended and the Board determined that **Jacob was the transferee.**

## SPECIFICATION OF ERRORS

I.

The Court below erred in imposing transferee liability on petitioners because the respondent had exhausted jurisdiction to initiate, and the court below to determine, such a proceeding by prior transferee proceeding involving the same taxable year.

II.

The Court below erred in imposing transferee liability on petitioners because;

(a) The uncontradicted and unimpeached evidence is that Robert T. Jacob alone received and retained the fund as his own under a claim of right and in derogation of any interest petitioners might have therein.

(b) Jacob could not **voluntarily** make himself agent or trustee for petitioners and thereby impose personal liability upon them by reason of the receipt and retention of the fund by him.

III.

The Court below erred in holding that the corporation, Central Holding Co., was liquidated, that Jacob received the fund in question as a liquidating dividend; and in refusing to hold that the transaction was a sale of the stock by Jacob to Barnes, and that he received the $20,422.10 from Barnes in payment therefor.

IV.

The Court below erred in holding that the Central Holding Co. became insolvent.

V.

The Court below erred in holding petitioners as transferees without a finding of fact that respondent exhausted his remedies against the taxpayer and there is no substantial evidence in the record to sustain such a finding.

VI.

The Court below erred in holding that respondent was not estopped from proceeding against petitioners as alleged transferees by the prior determinations.

VII.

The Court below erred in admitting in evidence respondent's Exhibit K (Tr. p. 129) over petitioners' objection.

The objection to the introduction of this exhibit was as follows:

> "The Petitioners object to the document signed by R. T. Jacob, which purports to be for the petitioners, on the ground that it is not binding on the Petitioners, and there is no evidence of authority to execute a receipt or receive money on their behalf, or that it was done pursuant to authority."

The objection was overruled and exception was taken. (Tr. p. 129)

VIII.

The Court below erred in permitting the witness Ellison (a deputy collector) to give hearsay testimony of converstions he said he had with other deputies and what they told him in reference to their attempts to ascertain property of the corporation which could be

subjected to the warrant of distraint (Tr. 146-151-152-153).

The testimony was objected to on the ground that it was hearsay and that the action taken on a warrant of distraint could only be shown by the return and not by parol (Tr. p. 151) and a motion was made to strike the evidence (Tr. p. 153). The objections were overruled; the motion denied and exception was taken thereto. (Tr. p. 153)

IX.

The Court below erred in failing to give effect to the statute which imposes the burden of proof upon the respondent to establish every element essential to a transferee liability.

## POINT I.

**Under Section 272(f) of the Revenue Act respondent was without jurisdiction to initiate and the court below to determine this transferee proceeding because jurisdiction had been exhausted by a prior transferee proceeding involving the same taxable year.**

### SUMMARY OF THE ARGUMENT

The transferee liability for the entire "~~table~~ taxable year" must be enforced in a single proceeding. If a notice of assessment was given for a **part** of the transferee liability for the taxable year in question, and a petition was filed with the Tax Court to review the assessment,

no further transferee proceedings could be prosecuted for another part of the tax for the same taxable year.

## ARGUMENT

Section 311 of the Revenue Act authorizes the assessment and enforcement of transferee liability

> "in the same manner and **subject to** the same provisions and **limitations as in a case of deficiency** in a tax imposed by this title."

The procedure for assessing and determining deficiency in tax is governed by Sections 271 and 272 of the Revenue Act.

Under Section 271 the procedure to assess and determine a deficiency in tax must be initiated by the Commissioner by a notice of assessment commonly called the "deficiency letter". This notice of deficiency is "vital to the Board's jurisdiction" (Merten's Law of Federal Income Taxation, 1943 ed., Vol. 9, p. 200, Sec. 50.10).

Section 272(f) of the Revenue Act (so far as material) provides,

> "If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Board within the time prescribed in such subsection, the Commissioner shall have **no right to determine any additional deficiency in respect of the same taxable year,** except in the case of fraud, and except as provided in subsection (e) of this section, relating to assertion of greater defiicencies before the Board, or in section 273(c), relating to the making of jeopardy assessments."

Subdivision (e) furnishes the explanation for this limitation. This provision gives the Tax Court in the first proceeding initiated, jurisdiction to determine the correct amount of liability if it appears from the record that the correct amount of the liability is greater than the amount asserted in the notice of assessment.

In **Commissioner v. Wilson, 60 F. (2d) 501 (10th Cir.)**, the court, after calling attention to the statutory provisions here referred to and their legislative history, held:

> "In event a petition is filed with the Board, jurisdiction is conferred upon it to increase the deficiency asserted by the Commissioner, and to determine that additional tax or penalties be assessed, if claim therefor is asserted by the Commissioner **before the hearing**. Section 274 (e) of the act (26 U.S.C.A. § 1048c). Reading these statutes together, we find a logical system without overlap: The Commissioner's authority to redetermine a deficiency is plenary until the taxpayer files a petition with the Board; **from that moment on, power over that taxable year is exclusively with the Board, except where a jeopardy assessment is necessary, or in case of fraud."**

**Merten's Law of Federal Income Taxation, 1943 ed., Vol. 9, p. 74,** says:

> "Once the taxpayer has appealed to the Board and the Board has rendered its decision, no further deficiency of tax for the taxable year in question may be determined or assessed."

The record in this case discloses that a notice of assessment of transferee liability was served on Robert T. Jacob for the two taxable fiscal years ended respectively June 30, 1937 and June 30, 1938. (Tr. p.

22) The assessment for the latter year (ended June 30, 1938), here involved, was for a **portion only** of the taxpayer's tax liability for that taxable year, to-wit, the **deficiency in tax only.** It did not include the tax liability disclosed by the return as filed. Jacob filed with the Tax Court a petition to review the assessment of the transferee liability asserted against him for both years. (Tr. p. 24) Issue was joined and the Tax Court made a determination therein based upon the stipulation of the parties imposing the transferee liability upon the petitioner therein. (Tr. p. 42) **Respondent did not attempt during that proceeding to have the Tax Court determine transferee liability against petitioner for the original tax disclosed by the income tax return for the tax year ended June 30, 1938 and no determination was made thereon.**

The tax liability sought to be imposed on petitioners herein is for the portion of the tax (original disclosed by the return) for the fiscal year ended June 30, 1938, which was not included in the former transferee proceeding.

The transferee liability for that particular year could not be split up into two independent proceedings, one with respect to the **original tax** disclosed by the income tax return as filed, and another with respect to a **deficiency in tax** for that year later determined.

When the respondent assessed and litigated only a portion (deficiency only) of the transferee liability for the taxable year in question, and did not by appropriate proceeding tender any issue before the Board

as to the **original tax**, respondent **exhausted his jurisdiction** to impose transferee liability with respect to the portion that was not included in that proceeding.

All the tax liability for a "taxable year", whether disclosed by the return, or a deficiency later determined, constitutes a single liability for that tax year.

The entire tax liability, including the liability sought to be enforced in this proceeding could have been enforced in the first proceeding because the same alleged trust fund ($20,422.10) was involved and that was more than sufficient to satisfy the entire liability.

## POINT II.

**There is no substantial evidence in the record to support a finding that petitioners are transferees of the alleged "trust fund" being followed in this proceeding. The record establishes without contradiction or impeachment that the receipt of the fund by Robert T. Jacob (assuming it was a liquidating dividend) was not for petitioners. He received and retained it as his own in derogation of and adversely to any interest of petitioners.**

## SUMMARY OF ARGUMENT

a.

The burden of proof is on respondent.

b.

A transferee proceeding, like a judgment creditor's

suit, is in rem and only the one who has the res is liable.

c.

Petitioners did not receive the fund. It was received by R. T. Jacob as his own and retained by him under claim of right and not for petitioners.

d.

Petitioners were not the owners of the stock. Jacob only promised to make a gift of the stock to them but did not complete the gift.

e.

An uncompleted gift creates no interest and cannot be converted into a trust in favor of the intended donees.

f.

Jacob could not constitute himself a voluntary agent or trustee for petitioners and thereby impose on them personal liability by his failure or refusal to carry out his intention to make a gift of the stock to them.

g.

Transferee liability cannot be imposed on petitioners merely because they might have a chose in action against Jacob for the stock or proceeds from the disposition thereof.

## ARGUMENT

**26 U.S.C.A., Sec. 115** provides that:

"In proceedings before the board the **burden of proof shall be upon the commissioner** to show that a petitioner is liable as a **transferee** of property of a taxpayer . . . ."

In U. S. v. Lane, 26 F. (2d) 830 (D.C. W. D. of Ky.) it was said:

> "The burden is on the government to prove that Lane received this $385,000 **as a stockholder of the corporation."**

This statute places a "real burden" on the respondent **(Troll vs. Com., 33 B.T.A. 598)** as to every fact on which the "transferee status is to be determined". **(Temoyan vs. Com., 16 B.T.A. 923.)**

A transferee proceeding, like a judgment creditor's suit, is **quasi in rem.** It is here sought to reach a specific fund ($20,422.10) received by Jacob. The question is whether petitioners are transferees of this fund. This is the asset that is being followed and **not the capital stock** of the corporation.

These are not proceedings to impose "personal liability" on principals for the acts of an agent or on beneficiaries for the acts of a trustee. This is a proceeding to follow trust funds. It is a proceeding **"in rem and limited". (Com. v. Oswego Falls Corp., 71 Fed. (2d) 673, Second Circuit.)** We are concerned only with the question, "Who has the res?"

Such proceedings "are directed rather against the thing than the person". **(Spellman vs. Sullivan, 43 Fed. (2d) 762; affd. 61 Fed. (2d) 787.)**

In **Phillips-Jones Corporation v. Parmley, 302 U.S. 233** (a transferee case), the Supreme Court said:

> "The liability of the stockholders for the taxes was not created by section 280 (same as § 311(a)(1) of

Revenue Act of 1936). It does not originate in an assessment made thereunder. Long before the enactment it had been settled under the **trust fund doctrine** (see Pierce v. United States, 255 U.S. 398, 402, 403) that if the assets of a corporation are distributed among the stockholders before all its debts are paid, each stockholder is liable severally to creditors, to the extent of the amount received by him;" . . . . . .

In **Mertens on the Law of Federal Income Taxation (1943 edition, Vol. 9, Sec. 53.06)** the writer says:

"The transferee provisions . . . . . merely permit collection . . . . by a summary procedure of his existing liability in law or equity. . . Thus, the **nature and extent of a transferee's liability must be determined by the settled principles of the common law and federal and local statutes.** The liability of a transferee is secondary, not primary."

In **Whitney vs. Commissioner of Internal Revenue, 26 B.T.A. 212,** the Board said:

"It follows that if a person claimed to be a transferee **has not received property** from the transferor no liability for the tax attaches to him."

We must not confuse the question whether petitioners received the fund, with the question whether Robt. T. Jacob rightfully or wrongfully received and retained the fund as his own; or whether petitioners had an equitable right to recover it from him. **(Rossi v. Commissioner, 41 B.T.A. 734.)**

The court below applied to this case the principles applicable to the latter question and not those applicable to the former.

The facts pertinent to this assignment of error established by uncontradicted and unimpeached testimony and for the most part conceded are as follows:

The corporation issued 300 shares of no par value stock, 100 shares to Barnes, 100 to Conley and 100 to Robt. T. Jacob.

**Prior** to the formation of the corporation Jacob told petitioners that he would give them his shares of the capital stock of the corporation when it was formed. His daughters were at that time approximately 15, 18, and 20 years of age. Jacob did not, and could not give the members of his family the stock after the corporation was formed because he was under the contractual duty to Farrell, to remain the owner of a majority of the stock. The corporation acquired title to the hotel and continued to operate it from July 1, 1936 until July 15, 1937, when the hotel building was (except for a small portion) destroyed by fire.

The building and contents had been insured for $72,000. Out of the first moneys obtained from the insurance companies the corporation paid the indebtedness to Farrell in the latter part of July, 1937. Jacob thereupon surrendered to Conley and Barnes the 26½ shares which each had theretofore transferred to him. The corporation also paid off all of its obligations.

After the fire the question arose as to whether the hotel should be rebuilt or other hotel property purchased. Barnes wanted to have the hotel rebuilt. Con-

ley was willing to rebuild if it could be done without going into debt, and Jacob wanted to withdraw. The result was that Jacob received in two payments the sum of $20,422.10 and he transferred the 100 shares to E. W. Barnes.

After Jacob returned to Conley and Barnes the 26½ shares belonging to each of them, all of the stock certificates of the three parties were rewritten but not signed at the time. Conley's 100 shares were divided between himself and his wife. Barnes' 100 shares were likewise divided between himself and his wife. Jacob's 100 shares were rewritten as follows: One share to Jacob, 24 shares to his wife, and 25 shares to each of the three daughters. These certificates were made out **(but not signed) about July 30, 1937.** Jacob sent the 4 certificates made out in the name of his wife and three daughters to his wife, who was then vacationing with his three daughters at Seaside, Oregon, with directions that they should sign the blank endorsements on the back of the certificates and return them to him. No explanation was made by Jacob as to the reason therefor, and he gave them no information as to his negotiations or transactions with his associates. The petitioners signed the endorsements and the certificates were returned to Jacob. They were signed on August 10, 1937.

Up to that time Jacob had not given to petitioners any certificates of stock, he had not given them any declaration of trust, nor had he in any manner (except the promise made **prior** to incorporation) communi-

cated to them his intentions with respect thereto. He had not informed them of the negotiations he was carrying on with respect to the disposition of the stock or the moneys he was to receive therefor, and they were in utter ignorance of every phase of the transaction. They merely followed Jacob's direction. There is not the slightest evidence that they had any knowledge of the reason or the purpose thereof.

On August 12, 1937, Jacob received the sum of $2422.10 and he executed the receipt. (Exhibit "K", Tr. p. 130.) He signed the receipt "R. T. Jacob for Agnes C. Jacob, Gwen Jacob, Shirley Jacob and Beverly Jacob."

Petitioners had not theretofore authorized or directed the receipt of the money by Jacob. They did not know that he intended to receive that money, or that he had received it, or that he intended to receipt for it in their name. He did not inform them that he had executed that receipt at any time after its execution. They never participated in the corporate affairs and knew nothing of its affairs. **This money was never turned over to petitioners directly or indirectly and was retained and used by Jacob for his own purposes.**

On August 17, 1937 Jacob received $18,000 in cash from E. W. Barnes. **No receipt for it was executed.** On that date (Barnes says the next day) Jacob delivered to Barnes the 5 certificates totalling 100 shares of stock. **Barnes testified that they were executed on August 18.**

Petitioners had not been informed that Jacob was to receive this $18,000 or that he had sold or was to transfer the stock to Barnes. They had not directed or authorized him to receive this money for their account or at all. They had not authorized or directed him to sell, transfer or otherwise dispose of the stock on their behalf or at all, and were in utter ignorance of the transfer of the stock to Barnes and of the receipt of the money by Jacob.

Jacob did not turn over to petitioners this money or any part thereof, directly or indirectly, neither did he set apart this money as a fund belonging to petitioners. On the contrary, he retained, appropriated and used the money as his own, for his own purposes, and **in complete derogation of any right that the petitioners might have had thereto.**

Jacob testified frankly and freely that he had promised the stock to the members of his family, that he regarded them as the beneficial owners thereof, that he intended them to have the stock, but **he abandoned that purpose because of the changed conditions.** When the promise to give them the stock was made, the children were young. His testimony was as follows: (Tr. p. 185)

> "My reason for not giving my family the money as I intended to give them an interest in a going concern **in the form of stock.** The question of making them **gifts of cash was not within my purpose, and I felt that would be unwise."**

The stock was never transferred on the books of the company to the petitioners. It was never delivered

to them. When the certificates were sent to them, it was **not for the purpose of delivery** but for the express purpose of signing an endorsement in blank to certificates which had not yet been executed. This was the condition of the certificates when they were delivered to Barnes and Jacob received the money. They were signed on that day or the next.

The petitioners were all called as witnesses by the respondent. They all testified that they never received any part of the fund, directly or indirectly, from Jacob or from any one else. Jacob, called as a witness by the petitioners, testified that although he had intended to make them a gift of the stock (not the money), he did not give them the money directly or indirectly; nor set it apart for them or hold it for them; but received it, used it, and appropriated it as his own, for his own use, and he stated the reason therefor.

Petitioners submit that under these circumstances there is no warrant in law for subjecting them to the **personal liability** which the decision appealed from imposes upon them.

The court below finds the facts to be as testified to by the petitioners and by Jacob, but it fell into two basic errors: **one,** it confused the question of the legal or equitable ownership of the capital **stock** with the question as to who received the **fund** which is the subject matter of this proceeding, and, **two,** it drew the unwarranted and erroneous conclusion that the receipt of the money by Jacob was in legal contemplation the

receipt by petitioners. This erroneous conclusion is summed up near the end of the opinion as follows.

> "The money received by Jacob from Central was received for these petitioners and not for himself."

The conclusion that Jacob received for the petitioners is in turn drawn from another erroneous conclusion, to-wit; that petitioners "were the owners of 99 shares of said stock at the time the fire insurance proceeds were distributed."

The respondent's case is not grounded upon the contention that petitioners **received the fund in fact** but upon the proposition that they received the fund **constructively.** In determining the effect to be given to the receipt of the fund by Jacob and whether it constitutes constructive receipt by petitioners (assuming, without conceding, that transferee liability can be predicated on constructive receipt) it must be remembered that there was **no consensual relation** of principal and agent, master and servant, or trustee and beneficiary between petitioners and Jacob.

In **Olson vs. Commissioner, 24 B.T.A. 702—aff'd 67 Fed. (2d) 726 (7th Cir.),** an employer deposited with a trustee 40 shares of stock each year for five years, to be delivered to an employee (taxpayer) at the end of five years. The stock was delivered at the end of the five years. The question arose whether the employee was taxable on the full amount of 200 shares in the year he received them or 40 shares in each of the five years. The Board rejected the idea that receipt by the

trustee in each year was "constructive receipt" by the taxpayer for tax purposes.

In **National City Bank v. Commissioner, 35 B.T.A. 999, aff'd 98 Fed. (2d) 93 (2d Cir.)**, the court made clear the distinction between cases in which the taxpayer receives property as his own **"under a claim of right"** and cases in which he receives property pursuant to **"an agreed relationship of principal and agent"** and it was held that only in the latter case was the receipt by the agent deemed to be constructive receipt by the principal. In imposing liability upon the taxpayer in that case the court said:

> "The income tax liability must be determined on the basis of what occurred and not on what might have happened."

The principle and distinction recognized in that case is applicable in the case at bar, for here, too, Jacob received the fund **"under a claim of right"** and retained it as such. He certainly did not receive the fund pursuant to an **"agreed** relationship of principal and agent" with petitioners. Here, too, the determination must be based upon "what occurred and not upon what might have happened". What actually occurred was that **Jacob had changed his mind about giving the** stock to his family. He disposed of it and retained the money as his own. He did so for reasons which he, as head of the family, deemed to be justifiable. As long as he retained that fund as his own it was properly taxable as income to him. The Commissioner assessed the tax upon that income to him and he paid it.

The **Circuit Court of Appeals** in affirming the decision in that case said:

> "Although taxes are public duties attached to the ownership of property, the state should be able to exact their performance without being compelled to **take sides in private controversies.** . . . .
>
> "It would be intolerable that the tax must be assessed against **both** the putative tortfeasor and the claimant;"

In **Rossi v. Commissioner, 41 B.T.A. 734-739,** an agent who was authorized to collect and disburse moneys for the taxpayer, received money for his principal and appropriated it to his own use. The Commissioner contended that the money received by the agent was constructively received by the taxpayer; that it constituted part of his income and was taxable as such.

The Board held that the money received by the agent could not be deemed taxpayer's income and subject to income tax as such merely because taxpayer has a claim which he could enforce against the agent. It would be taxable income only when he "actually received it." He cannot be taxed on income which he "might never receive"'

Neither can one be a transferee of property he did not and might never receive.

Petitioners never became the owners of the stock. Jacob merely made a **voluntary** promise to make a gift of the stock (not the fund) to petitioners. Petitioners had parted with **no consideration therefor.** Jacob was

merely a volunteer and we submit that he could not by any voluntary action on his part constitute himself an agent or trustee for petitioners without their knowledge and consent and thereby subject them to a personal liability by reason of his own failure or refusal (rightfully or wrongfully) to carry out his original generous impulse.

All that we have in this case is an **uncompleted** gift of the stock, and an abandonment of the purpose and intention to make the gift. It is uniformly held that an uncompleted gift cannot and does not pass any interest to the intended donee in trust or otherwise.

We are not concerned here with the question as to whether petitioners would have a valid cause of action against Jacob for the recovery of the stock or its proceeds. **This is not a controversy between them.**

Assuming, without conceding, that petitioners had acquired some equity in and to the stock, and in and to the fund received by Jacob upon the disposition thereof, petitioners would **merely have a chose in action,** a possible right of recovery from Jacob. Transferee liability cannot be imposed upon them merely because they might be able to recover the fund from Jacob. **(Brainard v. Commissioner, 91 Fed. (2d) 880,** Appendix, p. 3.) This liability could be imposed upon them only after they had recovered the fund from Jacob, for then, only, would they become transferees; assuming of course, that the fund was in law and in fact a liquidating dividend and other elements essential to transferee liability were present.

As long as Jacob retains the fund under claim of right **as his own** and holds it **adversely to petitioners,** they have not come into possession of any asset which was formerly the property of the Central Holding Co. (the taxpayer), whose tax liability is sought to be satisfied in this proceeding. **Jacob alone would be subject to that liability,** and was subjected to transferee liability in the prior proceeding.

In **John Hancock Mutual Life Insurance Company vs. Helvering,** 128 F. (2d) 745, the court held:

> "At the outset this method of collection (by transferee proceeding) not merely requires that the **petitioner shall have the money,** a sum certain, available as in garnishment or escrow . . . ."

Even in the case of an express trust, the beneficiary of trust property cannot be held as a transferee of property received by and in possession of the trustee. The trustee alone would be the transferee. See **Higley v. Commissioner, 69 Fed. (2d) 160 (8th Cir.)** (Text of opinion, Appendix, p. 1.)

In **Ross v. Commissioner, 43 B.T A. 1155**: W. R. Ross, the principal stockholder of the corporation, entered into an oral agreement with Hicks, Pershall and Jameson by which "the stock was considered as having been owned" by the four individuals in certain proportions. Profits were distributed to Ross and the other three individuals in the proportion fixed by the oral agreement. On the books of the company Ross appeared to be the owner of all of the stock except two shares standing in the name of Hicks and Pershall. On dissolution of the corporation all of the **assets were**

**paid to Ross** except $100.00 apiece to Hicks and Pershall. Transferee liability was asserted against Ross for the **entire amount** received by him. He contended that he was liable, if at all, only for an amount equal to the percentage of stockholding as fixed by the oral agreement. The Board held that **it mattered not whether the 3 other parties were the actual owners of part of the stock. The "controlling fact" was that Ross received the fund and he alone was liable for it.** (See text of opinion in Appendix, p. 36.)

So in the case at bar it is immaterial that Jacob regarded the members of his family as the beneficial owners of the stock. The fact remains that **he personally received** the **money** and, rightfully or wrongfully, retained it and claimed it as his own. Petitioners did not get it, and therefore if there is any transferee liability he alone is liable.

In **Burke v. Commissioner, 21 B.T.A. 45,** the transferee proceeding was against an heir at law of a decedent who had received property on dissolution of a corporation, the property was not actually received by her. The Board held:

> "A petitioner is liable as a transferee only to the extent of the value of property of the taxpayer **received,** and **since the respondent has not in this case shown that the petitioner, in her individual capacity, has ever received any of the assets of the dissolved corporation, we hold that in such capacity the petitioner is not liable, at law or in equity, for any unpaid taxes of the corporation."**

In **U. S. v. Best, 19 Fed. Suppl. 361 (D.C. Mass.),** the court refused to impose transferee liability on certain stockholders of record of a dissolved corporation because the evidence failed to establish that they actually received the liquidating dividends. The court held that the burden was on the Commissioner to show the stockholder "received funds".

That case also supports the proposition that where the showing made by respondent is consistent with receipt of the fund by Jacob **in his own right** as it is with receipt by him **for petitioners,** there is a **failure of proof** on the part of respondent for he has the burden of establishing the essential fact by a preponderance of the evidence.

In **Wright v. Commissioner,** 28 **B.T.A. 543,** the Board held:

> "There was **no liability** on the part of these petitioners as transferees **until** the **assets** of the decedent's estate had been **distributed to them** and the estate left without means to pay its tax."

In **Harjo v. Commissioner, 34 B.T.A. 467,** the petitioner became entitled to a share of the decedent's (wife's) estate. The estate was probated and his share allotted to him, but there was **no actual distribution to petitioner** because he was an Indian ward of the Government. The fund was retained by the Secretary of the Interior and held by him for the petitioner. The Board denied transferee liability because the fund was in the hands of the Secretary of the Interior.

Jacob did not become a trustee of the stock or money by virtue of the promise he made before the corporation was formed, because it was a gratuitous promise and the property was not in existence when it was made. No trust arose even when the corporation came into existence. **(Sec. 75, Restatement of the Law of Trusts.)** (Text in appendix, p. 2.)

In **Brainard v. Commissioner, 91 Fed. (2d) 880 (7th Cir.)**, the court held that a trust cannot be created in stock to be thereafter acquired where the **promise is gratuitous** and that no trust interest attaches when the stock does come into existence (see text of opinion, Appendix, p. 3).

The case of **Weil v. Commissioner, 31 B.T.A. 899—aff'd 82 F. (2d) 561 (5th Cir.), cert. den. 299 U.S. 552,** the father of four daughters contended that he had made them a gift of certain stock. The evidence disclosed that he had performed a great many acts which demonstrated his intention to make a gift and which were consistent with a completed gift. Upon the facts the case was much stronger than the case at bar. Nevertheless, the Commissioner contended that there was neither a gift or trust because there had been no delivery of stock to such an extent that it could be said that the father had parted with all dominion and control over the stock. He was sustained in that contention by the **Board of Tax Appeals and the Circuit Court of Appeals.** (Summary of the facts and text of opinion in Appendix, p. 4). We respectfully invite attention to the opinions of both courts in that case.

We believe that the case is decisive upon the questions here involved.

Under the law of the state of Oregon petitioners had not acquired either the **stock** or the **money** as a gift from their husband and father, Robert T. Jacob. The law of gifts in the State of Oregon is crystalized in the following cases:

**Waite vs. Grubby, 43 Or. 406.**
**Allan vs. Hendrick, 104 Or. 202.**
**Miller vs. Medford National Bank, 115 Or. 366.**
**Grosz vs. Grosz, 151 Or. 438.**
**Kjensbek vs. Charity Board, 125 Or. 358.**

These decisions lay down the rule that the donor "must divest himself of the property"; that the gift must "operate immediately and irrevocably." There must be 'not only a donative intention but also a complete stripping of the donor of dominion or control over the thing given"; that "mere promise without consideration" cannot be converted into a "voluntary trust"; that "there must be a parting of dominion . . . so fully and completely . . . that if the donor again resumes control over it without consent of the donee he becomes a trespasser . . ."; that "the gift must be complete and nothing left undone" and the gift must go into "immediate and absolute effect".

By no stretch of the imagination can it be said that Jacob had carried out his intention, made delivery and completed the gift in the manner and to the extent contemplated by these decisions.

It is also settled that while love and affection may constitute consideration for an **executed** gift, it does **not** constitute consideration to support a **promise** to make a gift or the creation of a voluntary trust. (28 C.J. 130 and 65 C.J. 240.)

The law is also well settled that an uncompleted gift cannot be converted into a trust.

In 65 C.J. 378, the rule is stated as follows:

> "(Sec. 152) 3. **Imperfect Gift.** Equity will not convert an imperfect gift into a declaration of trust, merely on account of such imperfection; and so, where a donor delivers personally to his agent with instructions to give it to a specified donee, which the agent fails to do, such agent is not a trustee of the property for the donee."

The Board of Tax Appeals and the Circuit Courts of Appeal have rejected the idea that an uncompleted gift can be converted into a trust. In **Weil vs. Commissioner, 82 F. (2d) 561 (5th Cir.), cert. denied, 299 U.S. 552, the court held:**

> "The evidence to establish a voluntary express trust in personal property must show a clear intention to create a trust. **Equity will not make one where none has been clearly declared. A defective or imperfect gift will not be converted into a trust.** Elliott v. Gordon, 70 Fed. (2d) 9; Eachen v. Steers, 10 Fed. (2d) 740.

To the same effect are

Morsman v. Commissioner, 90 Fed. (2d) 18 (2d Cir.), Appendix, p. 35.
26 R.C.L. 1185, § 21, Appendix, p. 34.
12 R.C.L. 951, § 26, Appendix, p. 34.

We submit that petitioners should not be penalized because Jacob rightfully or wrongfully abandoned his purpose to make them a gift of the stock or money and retained it as his own.

## POINT III.

**The court below erred in admitting in evidence respondent's Exhibit (K); and in giving effect thereto as evidence against petitioners and predicating its determination thereon.**

## SUMMARY OF ARGUMENT

There is ~~on~~ no evidence that Jacob was agent for petitioners; that he was authorized by them to receive the money **for them**; or that they authorized him to sign the receipt **for them**; or they had any knowledge of the negotiations between Jacob and Barnes; or that they ever ratified the execution of the receipt by Jacob by receiving the money or in any other manner. Hence, the Court below erred in admitting in evidence the receipt signed by Jacob "for petitioners" and in predicating its decision thereon.

## ARGUMENT

Respondent offered in evidence the receipts, Exhibit (K) (Tr. p. 129). The exhibit consisted of three receipts, one signed by Conley, another by Barnes and a third by Jacob (Tr. p. 130). The instrument signed by Jacob (Tr. p. 130) acknowledges the receipt of

$2,422.10 "being one-third of the proceeds of insurance on hand this date. Application of such distribution to be later determined." It is signed: "Robert T. Jacob for Agnes C. Jacob, Gwen Jacob, Shirley Jacob, Beverly Jacob.

Petitioners objected to its introduction in evidence "on the ground that it is not binding upon petitioners and there is no evidence of authority to execute or receive money on their behalf, or that it was done pursuant to authority." The objection was overruled and exception taken (Tr. p. 129).

We submit that the court below committed error in the admission of this receipt. That document could, of course, be used **against Jacob** as a declaration against interest. But it was certainly not binding upon petitioners in the absence of evidence conferring upon Jacob (a) authority to receive money on their behalf, (b) authority to sign the receipt, (c) authority to dispose of the stock for them, or in the alternative evidence of ratification. There is not a scintilla of evidence supplying any of these requirements.

Jacob could not voluntarily make himself petitioners' agent and thereby impose personal liability upon them merely by the abortive intention to make them a gift of the stock.

If they were the owners of the stock, Jacob had no authority to sell it (**Weil v. Commissioner, 82 Fed. (2d) 561 (5th Cir.)**, Appendix, p. 8), and therefore had no authority to execute a receipt for them.

In 2 **Corpus Juris** 935, the rule is stated as follows:

> "The declaration of an alleged agent made to a third person in the absence of the alleged principal, which were not brought to his knowledge or ratified by him, and not supported by other evidence, are not competent against the alleged principal to prove the fact of his agency; and this rule that denies the competency, as against an alleged principal, of declarations of the alleged agent made to a third person in the absence of the alleged principal is particularly applicable where the alleged principal denies the agency, nor are such declarations competent to disprove the agency, or to prove a renewal thereof. . . . .
>
> . . . . . .
>
> "The general rule applies equally to oral statements of the agent, and to written statements contained in letters, letterheads, **receipts** or other documents, implying, admitting, or claiming authority to act as agent in the negotiations with the third person."

The error vitally affected the decision of the court below. It gave the receipt controlling significance and it is a fair inference that without the receipt it would not have reached that conclusion.

The opinion indicates that the court below proceeded as though the issue was between Jacob and the petitioners. It ignored the rule that before petitioners could be charged with Jacob's declarations, respondent had the burden of proving that he was their agent and was acting within the scope of his authority.

Even if petitioners were the beneficial owners of the stock, that would not authorize him to dispose of it, receive money and sign a receipt **for them** without their consent.

Since the court below permitted itself to be influenced by illegal evidence this court must now determine the question by its own appraisal of the record, disregarding the incompetent evidence, and must draw its own conclusion therefrom.

## POINT IV.

**Respondent is estopped to assert that petitioners are transferees, by prior inconsistent determinations.**

## SUMMARY OF ARGUMENT

a.

Respondent made a determination that petitioners were not transferees of the fund in question, when he examined the income tax returns filed by petitioners in which they reported proportionate parts of the fund as their income and they paid tax thereon and he refunded the tax paid by them.

b.

The transferee proceeding initiated and prosecuted to judgment by respondent against Jacob as transferee of the same fund bars this proceeding against petitioners, for it involves the same fund and respondent contended in said proceeding and it was determined that petitioners herein were not transferees of that fund.

c.

Jacob and these petitioners could not be transferees of the same fund.

## ARGUMENT

Robert T. Jacob is an attorney whose practice is limited to income tax law. When he received the fund in question he realized that a question would arise as to the tax liability upon the profit derived from the disposition of the stock, because he had promised to make a gift of the stock to petitioners. To avoid any implication of bad faith he reported the receipt of the $20,422.10 as income in **his** personal income tax return and paid a tax thereon. His wife and daughters also reported as income the same fund. Each reported one-fourth in their personal income tax returns and paid a tax thereon. Jacob attached to his return a lengthy explanation as to the reason for reporting and paying the tax on that income twice (see text quoted in full in the opinion, Tr. pp. 79-81).

With the facts thus placed before the respondent he made an investigation and **determined** that the petitioners had **not** received a gift of the stock; that the

> "Stock held to be the income of her (husband) (father )"
>
> . . . . . .
>
> "Taxpayer held to have received **proceeds from liquidation** of Central Holding Co. stock **as a gift rather than a gift of stock** certificates."
> (Pet. Exh. 9, Tr. p. 180.)

Respondent refunded the tax paid by petitioners. Thus respondent with knowledge of the facts, made a determination that petitioners were not the owners of the stock.

Since Jacob was the owner of the stock, he received the fund paid therefore **as his own** and not for petitioners. The determination that Jacob later made a gift of the **money** to petitioners has been abandoned.

The determination clearly and definitely held **Jacob** to be the **owner of the stock** and, **therefore,** the **owner of the funds** paid to him as alleged liquidating dividend.

Thereafter respondent instituted a transferee proceeding against Robert T. Jacob involving the same fund (see notice of assessment letter to Robert T. Jacob, Tr. p. 24 and petition, answer and proceedings thereon, Tr. pp. 24-55). Respondent alleged in that proceeding that on August 17, 1937 "the petitioner herein (Robert T. Jacob) was a stockholder in said Central Holding Co.; that as such stockholder and without consideration there was distributed by the Central Holding Co. to the petitioner (Jacob) on to-wit, August 17, 1937, assets and property consisting of cash in the sum of, to-wit, $20,422.10" (Tr. p. 40); that by reason of the premises the petitioner (Jacob) became and now is liable as a transferee of the property of the taxpayer.

During the trial of said proceeding which was tried jointly with the proceeding to determine the deficiency against the taxpayer as well as transferee proceedings against Conley and Barnes, the respondent and all of the petitioners in said proceedings made the stipulation entered of record in open court which is reproduced in full (Tr. pp. 46-49). It was stipulated by respondent and petitioner Jacob that **Jacob was the trans-**

**feree** (Tr. p. 48). Based upon this stipulation, the Board of Tax Appeals entered its decision that Jacob was "liable as a transferee" for the deficiency in tax assessed against the corporation (Tr. p. 53).

Pursuant to that determination respondent assessed against Jacob the transferee liability and Jacob paid a sum in excess of $9,000.00 in satisfaction thereof (Tr. p. 127).

Thus for the second time, respondent, with knowledge of the facts, determined that Jacob was the transferee and not the petitioners herein and later prosecuted a transferee proceeding against Jacob involving the identical fund and procured a judgment holding Jacob to be a transferee of that fund and liable for the corporation's unpaid income tax.

By these determinations respondent is estopped from again litigating the issue because respondent made an **irrevocable election** and determination to treat Robert T. Jacob as the owner of the stock and the recipient of the alleged liquidating dividend and was therefore transferee, and that the petitioners herein were not the owners of the stock and the recipients of the alleged liquidating dividend.

The first determination resulting in the refund to petitioners was, of course, in a proceeding between the same parties now before the Court. It involved the **same alleged trust fund.** It involved liability for income tax of the Central Holding Co. (taxpayer) for the same year, to-wit: fiscal year ending June 30,

1938, and it involved the same issue, to-wit: Were the petitioners the stockholders of Central Holding Co., and as such did they receive **the fund** in question as a liquidating dividend?

We submit that these determinations, under the authorities which will be presently cited, precludes respondent from now asserting that the petitioners were the "transferees". The only difference in the instant and the former proceeding is that it involved the liability for the **deficiency** in income tax, whereas, in this proceeding there is involved the liability for the **original tax** disclosed by the return. In legal contemplation the deficency and the original tax constitute **a single tax for the year in question.** The liability for both depends upon the identical facts, the same legal status of the parties and the same transaction. **One could not be a transferee so far as the original tax is concerned and not a transferee so far as the deficiency is concerned, or vice versa.** Hence this difference cannot change the legal effect of the former determination.

The parties in the first transferee proceeding and in this proceeding are in legal contemplation the same. It is true the first proceeding was against Jacob and this one is against petitioners. But respondent now charges that Jacob received the fund for them, that he was their agent or trustee, therefore they were in privity and the proceedings are therefore in law between the same parties.

In any event in the two former proceedings as well as in the present proceeding the **crucial issue** is the same, namely whether the specific fund of $20,422.10 was received by Jacob as his own under a claim of ownership or whether it was received by petitioners. This issue is common to all of these proceedings.

The respondent assumes a position **diametrically opposed** to that which he assumed in all former proceedings in so far as he makes the contention that the petitioners are transferees, and we submit that he is precluded from doing so.

In **U. S. v. Brown, 86 Fed. (2d) 798 (6th Cir.)**, the Court held squarely that the former proceeding **"unequivocally constituted an election"** where the Commissioner first determined that petitioner received the fund as income and imposed income tax thereon and later sought to hold him as a transferee of the same fund. (Summary of facts and opinion, Appendix, p. 15.)

In **Tait, Collector of Internal Revenue v. Western Maryland Railway Co., 289 U.S. 620—53 S. Ct. Rep. 706**, the Supreme Court virtually disposed of all contentions that are advanced in this case with respect to the effect of the prior determinations as an estoppel against the respondent.

We deem that case to be controlling here. The statement of facts in that case and the opinion are too lengthy to be set out or summarized here. Pertinent parts of the opinion are quoted in the Appendix, p. 10.

We respectfully invite the attention of the Court to the full text of the case in 289 U.S. 620. The Court made clear the distinction between "res judicata" and "estoppel by judgment" and the extent to which there need be identity of parties, subject matter and issues under each doctrine. The principles there enunciated compells the conclusion that respondent is estopped to urge that petitioners are transferees.

The Board refused to give effect to the estoppel because petitioners have not shown that they have in any way been **damaged or mislead to their detriment** by the respondent.

The doctrines of **estoppel by judgment** and **res judicata** are based upon **public policy, not damage or detriment.** The **Supreme Court** so held in the **Tait case.** It said:

> "The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citiens."

In **United States vs. Mosier, 266 U.S. 236,** the Supreme Court pointed out the distinction between res judicata which requires identity of parties and subject matter, and estoppel by judgment in which there need be only identity of issue determined. (See text of opinion, page 14 of Appendix.)

In **Ford Motor Co. v. U. S., 9 Fed. Suppl. 590 (Ct. of Cl.) (Cert. den. 296 U.S. 636),** the court refused to permit the Government to

"Assign a certain status to a taxpayer for the purpose of collecting taxes and then give it another status in refusing to allow interest."

The Court said:

"It necessarily follows that they must be regarded and treated on the same basis in all transactions having to do with the adjustment and settlement of such tax liability. If they are separate taxpayers in the assessment and payment of the tax, they cannot be considered and treated as constituting a single taxpayer in respect to overassessments and deficiencies."

So in the case at bar the fund could not be the property of Jacob for his own tax purpose and the property of petitioners for the purpose of transferee liability.

Neither could Jacob be the transferee of the fund for part of the tax liability and petitioners be the transferees of the **same fund** as to another part of the same tax liability.

It has been said that "men must turn square corners when dealing with the government." **(Rock Island Etc. R. Co. v. U. S., 254 U.S. 141)** But there is the reciprocal obligation that "The Government ought to turn square corners when dealing with its citizens". **(Howbert vs. Penrose, 38 F. (2d) 577 (10th Cir.))**. It cannot be said that the government is turning square corners in this case when on the one hand it has assessed an income tax on Jacob on the theory that the fund of $20,422.10 was his property and his income and has imposed upon him ~~income tax~~ because he re-

transferee liability

ceived that property as his own, and now assert that after all, Jacob was not the owner of that fund, it was not his income, it was not his property, he was not a transferee, but these petitioners, the members of his family were all the time the true owners of the fund and should be held liable as transferees.

If appellants were in law and in fact the transferees of the fund in question, then respondent committed a legal fraud upon Jacob in (a) assessing and collecting from him income tax on the receipt of the fund, and (b) in bringing against him transferee proceedings by reason of the receipt of the same fund, obtaining judgment thereon and collecting and returning the sum in excess of $9000 in payment of the liability so imposed.

## POINT V.

**The Court below erred in holding that the fund received by Jacob was a liquidating dividend and in refusing to hold that he received the said fund from E. W. Barnes as payment for the stock sold to him.**

## SUMMARY OF ARGUMENT

The transaction was in fact and in law a sale of stock by Jacob to Barnes and not the distribution of a liquidating dividend. The fact that Barnes either appropriated or borrowed money of the corporation with which to make the purchase, does not convert the transaction into a liquidation of the corporation. If

anyone was a transferee it was Barnes. It was contemplated that the corporation should and it did continue in existence, and to function as such. It bought and operated hotel property after the sale of the stock by Jacob to Barnes.

## ARGUMENT

For the purpose of the discussion of this question it is immaterial whether the stock turned over to Barnes was the property of Jacob or of the petitioners. If the transaction was a sale of the stock to Barnes and the money was received from him in payment therefor, it was not a liquidating dividend and neither Jacob or petitioners are liable as transferees.

There is little or no dispute as to what was actually said and done by the parties with respect to the disposition of the Jacob stock. The issue is only as to the legal effect of the transaction.

While the building was on fire, Barnes, who was at Burns, called Conley at Portland by long distance telephone and informed him of the fire. Conley informed Jacob, who was also in Portland, and they discussed briefly the future. Jacob expressed the desire to withdraw from the enterprise if the building was lost. Conley was disposed to rebuild if it could be done without going too much in debt. Conley went to Burns the next day. Barnes wanted to know if Jacob and Conley wanted to rebuild. Conley told Barnes of his conversation with Jacob and reiterated his own position. Barnes said to Conley (p. 135): "If you and

Mr. Jacob step out, will you give me your stock?" Conley said, "I can speak only for myself, and if I step out I will give you my stock and I will ask Mr. Jacob when I go back to Portland". Conley said he asked Jacob and he said he would. In a few days Barnes came to Portland but before coming down he was already engaged in making plans and getting estimates for reconstruction of the hotel. When he came to Portland he discussed the matter with Jacob.

Barnes nowhere purported to testify to the actual conversation that he had with Jacob in Portland. He testified largely to conclusions. He testfied:

> "I asked them if they would give me their stock and they said 'yes' ". (Tr. p. 157)

Jacob testified (Tr. pp. 182 and 183) that when Barnes came to Portland

> "that he planned to rebuild the hotel and he had to be on the ground to make estimates of cost. **He** was planning a new hotel and **wanted to keep the corporation alive** because it would be easier to obtain loans and refinance the construction of the building if he did so and he wanted to know **if he could take me out** and acquire my stock if I didn't want to go ahead and then he said he would take me out if I would transfer by stock to him. . . (Tr. p. 186) He told me specifically he wanted to keep the corporation alive particularly for the convenience in borrowing money . . . . . I am positive Barnes used the phrase he wanted to take me out, and I interpreted the transaction as consisting of a sale by me of the stock to Barnes."

Barnes was in court when this testimony was given and did not contradict it.

This is the sum total of the testimony as to the conversations which resulted in the transfer.

With respect to the future of the corporation Conley testified as a witness for respondent that "the purpose for which the stock certificates were to be given to Mr. Barnes" was "to vest the ownership of the stock in Mr. Barnes so that he could go ahead and build, or whatever he wanted with the company" (Tr. p. 135).

Jacob testified that Barnes told him in the aforesaid conversation that (Tr. p. 182) "he was planning a new hotel and wanted to keep the corporation alive because it would be easier to obtain loans and refinance construction of the building."

Barnes himself testified (Tr. p. 159):

> "I would rather have the company anyway because I might want to borrow some money and I could borrow quicker if I had a company."

Before the transaction was concluded they discussed the question of the tax liability for the profit resulting from the receipt of the fire insurance money and they were advised by Jacob that since the corporation was to remain in existence and rebuild the hotel or purchase other hotel property, that no gain or loss would be recognized under the statute governing involuntary conversion of property (Sec. 112(f)) where as if the corporation was liquidated there would be a tax of approximately $3,000.00 on the corporation. The continuation of the corporation and the saving of a tax liability resulting therefrom became a factor in the determination of the amount that Jacob was to

receive for his stock.

After these negotiations Barnes and Conley obtained $18,000.00 upon the settlement of the fire loss by some of the companies. Out of that money they paid off the balance of the indebtedness to Farrell and all other obligations of the corporation. Jacob returned to Conley and Barnes the twenty-six and a half shares which each had formerly turned over to Jacob to be held while the Farrell debt was unpaid.

Conley forwarded $5,000.00 of that insurance money to Barnes at Burns. He opened a bank account in the name of Central Holding Co. with that money. He immediately drew $2800.00 of it and purchased from the County the real property at Hines, Oregon, which had on it and unfinished hotel building. Title was originally taken in the name of Barnes but later transferred to the Central Holding Co.

In the meantime, Barnes was negotiating for a loan of $60,000.00 from the First National Bank at Portland, Oregon, but he was also investigating other hotel property.

Toward the end of July, 1937, and before any payments were made, the stock certificates of all of the parties were rewritten. Conley's holdings were divided between himself and his wife, Barnes' holdings were divided between himself and his wife and the hundred shares of stock in Jacob's name were divided one share to himself, twenty-four shares to his wife, and twenty-five shares to each of his three daughters. All of the certificates were made out but not signed. Jacob sent

the certificates made out in the names of his wife and three daughters to them at Seaside, Oregon, with the direction that they sign the endorsements in blank on the back of the certificates and return to him, which they did.

On August 12, after the Hines property was purchased, Jacob received the sum of $2,422.10 and signed the receipt, Exhibit (K), which recites "application of such distribution to be later determined."

On August 17th, Jacob was requested to meet Conley and Barnes at the First National Bank. He did so. Barnes handed Jacob $18,000 in cash and Jacob turned over to Barnes the five certificates totalling 100 shares. (Barnes says he received them the next day and that the certificates were executed the next day.)

Jacob had not been told that Barnes and Conley had received the $54,000.00 in settlement of the loss by another insurance company prior to or at the time that he received the $18,000.00. He did not know that the $18,000.00 was a part of the insurance money, but assumed that it was. At the time he got the money he handed Barnes a resignation as a director of the company.

The corporation was not dissolved. No resolution was ever adopted authorizing the distribution of any funds or the liquidation of the corporation.

Conley testified: (Tr. p. 137)

"When the stock was delivered the corporation was not dissolved. The corporation continued and in

December, 1937, purchased another hotel at Arlington, Oregon, which was named the 'Welcome Hotel'. The big neon sign 'Welcome Hotel' was transferred from Burns and put on the hotel at Arlington."

At least $20,422.10 remained in the corporation, Conley testified as a witness for respondent "at least it was left in the company" (Tr. p. 128).

Barnes stated in a letter addressed to Jacob (petitioners' Exhibit 5, Tr. p. 165) "the money that was left in the Central Holding Co. I can account for to the last penny." He testified this had reference to the $20,422.10 (Tr. p. 168), although in his oral testimony he spoke of that money as his own.

In November, 1937, the Central Holding Co. contracted to purchase the Arlington Hotel at Arlington, Oregon, and it took title to the hotel in December, 1937. It changed the name to Welcome Hotel and removed the big neon sign which had been on the Burns property. The Arlington property was bought for $50,000.00. It was paid for as follows: something over $5,000.00 in cash, $15,000.00 by conveyance of the Hines property which the corporation had acquired shortly after the fire, $5,000.00 by the assumption of taxes and a purchase money mortgage for the balance. The cash payment and $4,000.00 which was spent for reconditioning the hotel immediately afterward, was paid out of the $20,422.10 which remained in the corporation as aforesaid. The corporation thereafter continued to own and operate the hotel. The purchase money mortgage was executed by the corporation. The corpora-

tion was dissolved in January of 1941.

The Jacob stock was not surrendered for cancellation nor was it turned into treasury stock. It became the personal property of Barnes or Barnes and his wife. Barnes admitted that it was contemplated by all concerned that the corporation was to continue in existence; that it would continue to engage in the hotel business either by reconstructing the hotel at Burns or the purchase of another hotel property.

Of course it was not essential in order for the transaction to be a purchase and sale of the stock to Barnes that the word "sale" should be used in their conversation or that there should be a bill of sale. A transaction is not judged by the terminology used by either or both parties. The legal effect of what was actually said and done must govern. (**U. S. v. Boss & Peake Auto Co., (9th Cir.)**, a transferee case, Appendix, p. 18).

The inquiry made by Barnes whether he could "take out" Jacob clearly implies a desire by Barnes to purchase and acquire his stock. It does not connote a request that Jacob make a gift of the stock or surrender to the corporation without consideration.

If the language employed is ambiguous, that ambiguity must be resolved against the respondent for the burden of proving the character of the transaction was upon the respondent, particularly so in view of the fact that Barnes did not purport to give any conversation with Jacob upon that important fact.

But whatever ambiguity there may be is dissipated by all of the circumstances and the subsequent conduct of the parties. These are as follows:

The stock was not surrendered to the corporation for cancellation. It was not turned in to the corporation to be held as treasury stock. There was no resolution of the Board of Directors to distribute the money as a liquidating dividend. There was no resolution that the corporation be dissolved. Dissolution was not a part of the transaction, although Barnes contemplated dissolving the corporation after it rebuilt or bought other hotel property. It was the express intention and desire of Barnes that the corporation should continue, for the reason, among other things, that it would facilitate borrowing money for rebuilding. The corporation did continue in existence. It acquired the Hines property even before Jacob parted with the stock. It purchased the Hines hotel property. **$20,422.10 remained the property of the corporation in any event.** Conley, respondent's witness, testified (Tr. **p. 128):**

"At least it was left in the company."

And Barnes, respondents' witness, acknowledged that it was left in the corporation, in his letter of January 4, 1938. **(Petitioners' Exhibit 5, pages 164-166).** The corporation continued in existence until dissolved in January, 1941. **(Tr. p. 211)**

It was contemplated from the very inception for the purpose of avoiding a tax on the corporation for

the profit resulting from the receipt of the fire insurance money, that the corporation should continue to function as such and engage in the ownership and operation of hotel property either by reconstructing the destroyed building or purchasing other hotel property, and that the money should be set apart for that purpose in accordance with the statute covering involuntary conversion. (26 U.S.C.A. 112(f).) This understanding was embodied in the oral advice which Jacob gave to Barnes and Conley and was confirmed in the letter which he sent Barnes.

All of these circumstances and subsequent course of conduct are inconsistent with a liquidation of the corporation and consistent only with the conclusion that the transaction was a sale of the stock to Barnes and that the money which he turned over to Jacob was payment for that stock.

The most that can be said is that Barnes and Jacob construed differently the legal effect of the transaction. That would not justify adoption of Barnes' interpretation if in law it was a sale by Jacob to Barnes.

If the transaction was to be a liquidation of the corporation then why was it necessary to transfer any stock at all? Why was Conley's stock rewritten and new certificates issued dividing his partly to himself and partly to his wife? Why was Barnes' stock rewritten so as to divide it party to himself and partly to his wife? Why were not the Jacob shares cancelled?

They purposely refrained from liquidating the corporation. The subsequent course of procedure was in harmony and consistent with that purpose because at least $20,422.10 was retained in the corporation. The unfinished hotel property at Hines, Oregon, was purchased for that purpose. The hotel property at Arlington was purchased and operated for that purpose.

It may be that Barnes contemplated that he would ultimately dissolve the corporation and transfer the property to himself, but this was to be only after the corporation had complied in all respects with the requirements of section 112(f) of the Revenue Act. But that does not effect the transaction. **(U. S. v. Boss & Peake Auto Co.)**

The fact that Barnes used the corporate funds with which to make the purchase does not convert the transaction into a corporate liquidation and distribution of its assets. **In legal effect Barnes either borrowed or appropriated the funds of the corporation with which to acquire personally the Jacob stock. (U. S. v. Boss & Peake Auto Co.)**

In either case the corporation had a valid claim against Barnes for the money so appropriated.

**This court** and others have held squarely in transferee cases that the fact that one of the stockholders uses the assets of the corporation to finance the purchase of the capital stock of another stockholder **does not make the transaction a liquidation,** and that it is none the less a purchase and sale of the stock between

the individual stockholders.

It was also decided by this court that the fact that the party acquiring the stock contemplated a dissolution of the corporation immediately or shortly after the consummation of the transaction does not convert the transaction into a liquidation and a corporate distribution.

**U. S. v. Boss & Peak Auto Co., 285 Fed. 410 (Or.), affirmed 290 Fed. 167 (9th Cir.).**
**Commissioner v. Southern Bell Tel. & Tel. Co., 102 Fed. (2d) 397 (6th Cir.).**
**Harvard v. Commissioner, 25 B.T.A. 1161.**
**Dudley v. Commissioner, 15 B.T.A. 570.**
**Robinson v. Commissioner, 22 B.T.A. 395.**
**Rolnick v. Commissioner, 20 B.T.A. 989.**

The case of **U. S. v. Boss & Peake Auto Co., 285 Fed. 410 (Or.), aff'd 290 Fed. 167 (9th Cir.), decided by this court,** is, in our opinion, decisive of the case at bar. There the stock of the corporation was owned by two stockholders in equal parts. One acquired the stock of the other and the assets of the corporation were used to pay off the retiring stockholder. The question was whether the transaction was a liquidation of the corporation or a sale of the stock by Peake to Boss. Notwithstanding the fact that upon the oral testimony there was a preponderance of the evidence that the transaction was a liquidation, the District Court and this Court held that the **legal effect** of what transpired constituted a sale of stock by Peake to Boss and that Boss alone was the transferee of the assets on the theory that he appropriated the assets and converted

them into money which he used to complete the purchase. **That is exactly what Barnes did in the case at bar.**

The summary of the facts and opinions of both courts are set forth in the Appendix, page 18.

In **Harvard v. Commissioner, 25 B.T.A. 1161,** the corporation owned a light plant and an ice plant. In December, 1923, it adopted resolutions authorizing the officers to dispose of all of its property. Sometime prior to June 1, 1924, it sold the light plant and in August, 1925, it sold its ice plant. About June 1, 1924, several individual stockholders, including the petitioners, were requested to surrender their stock and they were **paid therefor with the checks of the corporation.** This **stock** was **later re-issued to W. E. Corn** who was the **dominant stockholder**. After that transfer of stock the corporation continued to function until October, 1925, when it voted to dissolve.

Respondent determined transferee liability against the stockholders. The Board reversed the determination because the corporation continued in business for more than a year after the alleged transfer. (Text of opinion, Appendix, p. 35.)

In **Commissioner v. Southern Bell Tel. & Tel. Co., 102 Fed. (2d) 397 (6th Cir.),** the stockholders, sought to be held liable as transferees, contracted with one Stearn to sell him their stock at a fixed price per share. They endorsed the certificates and placed them in a trust company in escrow to be held until the payment

of the purchase price. The corporation was dissolved and thereafter **the money with which the purchase price of stock was paid was realized from the sale of assets of the corporation.** In affirming the ruling of the Board of Tax Appeals that there was no transferee liability, the court held:

> "Under Section 602 of the Revenue Act of 1928, in a proceeding before the Board of Tax Appeals, **the burden of proof rests upon the Commissioner to show that a petitioner is liable as transferee** of a taxpayer but the transferee must carry the burden of showing the transferor was not liable for the tax.
>
> . . . . . .
>
> "(10) Under this principle, the respondents, not being stockholders of the Fayette Company at the time of its dissolution and the transfer of its assets to the Lexington Company, could not be held liable as transferees. **The fact that the purchasers of their stock procured the moneys out of which they were paid from the sale of the assets of the corporation does not alter the rule."**

In **Rolnick v. Commissioner, 20 B.T.A. 989,** Rolnick and one Glass were each owners of one-half of the capital stock of the corporation. Glass was also a creditor of the corporation for money loaned to the extent of $29,000.00. The **corporation borrowed** $35,000.00 from the bank. The $35,000.00 was paid over to Glass, $29,000.00 to liquidate the indebtedness and $6,000.00 for the purchase price of his stock which was taken over by Rolnick. The board held Rolnick to be a transferee of corporate assets to the extent of $6,000.00 which was paid over to Glass for the stock taken over by Rolnick.

The same thing happened in the case at bar. Barnes used the corporate funds either as a loan or appropriation with which to purchase the Jacob and Conley stock.

Upon the authority of the cases referred to above we submit that the transaction which resulted in the receipt of the fund in question by Robert T. Jacob was not a liquidation of the corporation, in fact or in law. **The sum and substance of the transaction is that Barnes, desiring the continuance of the corporation and to become the owner of the stock of the corporation, purchased the Jacob and Conley stock and paid for it by utilizing corporate funds.** Whether he misappropriated the funds or whether in legal contemplation he borrowed them from the corporation, is unimportant so far as the legal effect of the transaction is concerned.

The respondent clearly failed to establish that basic fact by a preponderance of the evidence. He did not sustain the burden of proof as to the allegation that the corporation was liquidated and that the money received by Jacob was a liquidating dividend.

The fact that the amount received by Jacob approximated one-third of the net worth of the corporation is of no significance. The ownership of the stock represents an alliquot part of the corporate net worth and it is reasonable that stock should be sold for its intrinsic worth. In **U. S. v. Boss & Peake Auto Co., 295 Fed. 167,** this court said:

> "The fact that the selling price of the stock was fixed at approximately half of the value of the assets of the corporation is of little significance in view of the fact that each party owned half of the stock."

In **Sturtevant Co. v. Commissioner, 47 B.T.A., case No. 56, August 5, 1942,** the question for determination was whether the transaction was a sale of stock or a liquidation of the corporation and the Board in the opinion by Board member Sternhagen, upholding the contention of the taxpayer that the transaction was a sale said:

> "There is no more reason to act upon an artificial designation when used by the government than when used by the taxpayer."

So in the case at bar the transaction must be determined in accordance with the intention of the immediate parties involved which did not contemplate either dissolution or liquidation of the corporation. The transaction cannot be converted into a liquidation because by so doing the Government will be placed in a more favorable position with respect to tax liability.

In **Gregory v. Commissioner, 293 U.S. 465, 55 S. Ct. 266 the Supreme Court** held that in determining the character of a transaction the "motive" or "ulterior purpose" will be disregarded and the character established "by what actually occurred". The Court also said:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether to avoid them, by means which the law permits, cannot be doubted."

Upon this principle we cannot disregard in the case at bar the evident intention of all of the parties that there was to be neither a liquidation or a dissolution of the corporation, that they contemplated the continuance and operation of the corporation; **that there was to be only a change of stock ownership;** and that Barnes and his wife (who would become stockholders) would cause the corporation to reconstruct the hotel, or purchase another hotel and operate the same in the manner outlined in the advise given to the parties by Jacob, until such time as the stockholders saw fit to dissolve the corporation.

56-a

## POINT VI.

**There is no finding of fact that respondent exhausted the available remedies against the taxpayer and there is no competent evidence in the record that would sustain such a finding. Transferee liability cannot be imposed until all remedies are exhausted to collect the tax liability out of the taxpayer's property.**

## SUMMARY OF ARGUMENT

Without a finding of fact that respondent exhausted his remedies against the taxpayer, transferee liability cannot be imposed. The record establishes that the taxpayer (corporation) had property more than sufficient to satisfy the tax liability at the time of the alleged transfer and at the time of the com-

a.

Corporate entity of the Central Holding Co. and its continued existence cannot be ignored.

**Commissioner v. Eldridge, 79 F. 2d 629, 9th Cir.**
**Burnett v. Clarke, 287 U.S. 404.**
**Klein v. Board of Supervisors, 282 U.S. 19.**
**U. S. v. Phellis, 257 U.S. 156.**
**Eisner v. Macomber, 252 U.S. 189.**
**Lynch v. Hornby, 747 U.S. 339.**
**Jones v. Helvering, 71 F. 2d 214.**
**Dalton v. Bower, 287 U.S. 404.**

In the **Jones case, supra,** the court said:

"The Supreme Court has been at great pains to point out time and again that a corporation is a legal entity and as such wholly different and distinct from its shareholders. In a recent case the Court said: 'But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.' "

In the **Dalton case, supra,** the Supreme Court said:

"Certainly under the general rule for tax purposes, a corporation is an entity distinct from its stockholders, and the circumstances here are not so unusual as to create an exception."

b.

This rule applies even where there is only one stockholder.

**Burnett v. Commonwealth, 287 U.S. 415.**
**Christopher v. Commissioner, 13 B.T.A. 729.**

c.

The fact that minimizing the tax burden was one of the reasons for continuing the corporate existence, does not warrant ignoring the corporate entity. **Commissioner v. Eldridge, supra (9th Cir.),** and **Jones v. Helvering, supra.**

In the **Eldridge case, supra,** this Court said:

> "It is argued by the Commissioner that the transfers by respondents to the corporation were made for the purpose of establishing a deductible loss for income tax purposes. This, if true, is unimportant. A taxpayer may resort to any legal method available to him to diminish the amount of his tax liability. Gregory v. Helvering, supra; Superior Oil Co. v. Mississippi, 280 U.S. 390, 395; Bullen v. Wisconsin, 240 U.S. 625, 630; Jones v. Helvering, supra."

mencement of the transferee proceeding. The warrant of distraint was never executed; no return was ever made. The evidence fails to establish that any efforts were ever made that would have potency to obtain satisfaction of the tax liability. Respondent did not avail himself of the remedies provided by 26 U.S. C.A. 3615 and 3654 to discover assets of the corporation.

## ARGUMENT

The court below made no finding of fact that respondent exhausted his remedies against the property of the taxpayer (corporation). Under the authorities referred to hereafter, Transferee liability cannot be imposed without the performance of that condition precedent. It is just as essential as a return of execution nulla bona prior to commencement of a judgment creditor's suit.

Neither does the record contain any substantial evidence on which such a finding could be made.

The record so far as it bears upon the efforts made by respondent to exhaust his remedies against the property of the taxpayer is as follows:

On November 9, 1938, a warrant of distraint (Resp. Exh. P) was made out (Tr. p. 145). It bears the notation that on March 7, 1939, liens were filed with the Clerk of the United States District Court at Portland, Oregon with the County Clerk of Multnomah County, Oregon, with the County Clerk of Harney County, Ore-

gon, and the County Clerk of Gilliam County, Oregon. The principal place of business of the corporation and its address was in Portland, Multnomah County, Oregon. The Welcome Hotel, which was destroyed by fire was located in Harney County, Oregon. The Arlington Hotel property which was purchased in December, 1937, was located in Gilliam County, Oregon.

Robert Ellison, a special zone deputy, testified that he received the warrant in **March,** 1938. (Tr. p. 145) This seems erroneous because the warrant is dated **November,** 1938, and from the fact that the liens were filed March 7, 1939, it is very likely that he meant to testify that he received the warrant in March, **1939.** The warrant requires that return be made on or before the 60th day (Tr. p. 147). The warrant contains instructions that upon execution of the warrant it should be promptly returned with a report showing in full the action taken in each case (Tr. p. 149). When it is returned with the report of "no property found liable to distraint", the deputy so reporting must accompany the return warrant with his **affidavit** on form 53 (Tr. p. 150).

He testified that he wrote a letter "to our deputy" at Pendleton asking him to call upon the taxpayer (corporation) (Tr. p. 151). He did not testify to the result of this effort.

He then testified that he personally called upon a Mr. Phipps in the American Bank Building who "is said to be counsel for the taxpayer (corporation) and asked him what the possibility of collection of the ac-

count was." (Tr. p. 152) He did not testify to the results of that conversation. There was no evidence that Phipps was the counsel for the taxpayer (corporation) and no explanation was given as to why he did not interview either Mr. Barnes or Mrs. Barnes or Mr. Conley who were then the officers of the corporation. He then testified, under question of the Board Member, that he called on a deputy in the office by the name of McEntee and asked him to call upon one of the officers of the corporation at Arlington, who, he believed, was in the Vendome Hotel there and he asked him to make an appropriate investigation of the corporation's assets for the purpose of determining whether or not the tax could be collected **and the report of that deputy was in the negative;** that the corporation was found to have an indebtedness in excess of its assets. (Tr. p. 152)

Objection was interposed to the question propounded by the Board Member but before the objection could be fully stated the Board Member said: "Just a minute. If you want to make an objection you may move to strike everything afterward."

Therefore, at the conclusion of the testimony a motion was made to strike the evidence as incompetent, irrelevant and immaterial, as **hearsay;** and on the ground that the action taken in the warrant of distraint can only be established by the **returns required by law to be endorsed thereon.** The motion to strike was denied and exception was taken. (Tr. p. 153)

It seems too plain for words that this testimony was entirely incompetent. The witness was permitted to narrate **hearsay** statements made to him by McEntee who in turn had interviewed someone at the Vendome Hotel, at Arlington, which is **not the hotel owned by the taxpayer** (corporation). He did not advise the court who was interviewed. It does not even appear that he did interview any officer of the taxpayer corporation. No showing was made as to what the investigation consisted of, what was said or what was done.

**The deputy was not produced so he could be cross-examined, nor was his absence accounted for by the respondent.**

The testimony is so palpably objectionable that no citation of authority is needed to demonstrate the proposition.

In any event, the action taken upon legal process can only be established by the lawful **return** of the officers who had the process for execution. **Here no return was ever made**. The blank form appearing upon the warrant (Tr. p. 148) shows that no return was made.

The instructions require that when a return of "no property" is made, that it must be **accompanied by an affidavit** on Form 53. No such affidavit was produced and there is no evidence that it was ever made.

It was obviously intended that it should not be sufficient for the executing officer to say that he found

no property. He was required to make a written statement **under oath** as to the activities which he engaged in to locate assets. From such an affidavit there would be at least prima facie evidence as to what efforts were exerted reasonably calculated to determine whether assets were available for satisfaction of the warrant.

It is well settled that action taken upon process cannot be established by parol. The written return of the officer is the only competent evidence.

> 50 C.J. 573.
> Morrison v. Covington, 100 So. 124 (Ala.).
> Sanford v. Edwards, 47 Pac. 212 (Mont.).
> King v. Bates, 45 N.W. 147 (Mich.).

The evidence of the witness Ellison that the report of that deputy (McEntee) was in the negative and that the corporation was found to have an indebtedness in excess of the assets, was clearly **hearsay**; and being parol evidence of execution of process was clearly incompetent. It therefore had no probative value as evidence of the exhaustion of remedies against the property of the taxpayer (corporation).

None of the deputies with whom the witness Ellison communicated were called to testify.

Now the failure to make a return of "no property", or any return at all, is highly significant in view of the fact that the taxpayer (corporation) actually did have property which could have been subjected to the satisfaction of its tax liability.

Why was no effort made to subject that property to the satisfaction of the tax liability?

Why was no effort made to examine Barnes under oath to discover property subject to distraint?

Why was no effort made to enforce the liens filed in the offices of the County Clerk of the three separate counties and in the Federal Court?

Why was no levy made upon the bank accounts of the corporation?

Why was no effort made to reach the $14,000.00 remaining after the purchase of the Arlington Hotel?

These questions demand an answer and explanation by respondent. The record is devoid of any answer to these questions.

This is all of the evidence as to the efforts made to ascertain assets of the taxpayer, Central Holding Company, and to satisfy the tax liability.

We submit that this did not constitute evidence of the exhaustion of respondent's remedies to satisfy the tax liability. These efforts were futile. The corporation had property standing in its name. It conducted its business at Arlington, Oregon. It presumably had its bank account there. Liens were filed and resort should have been had to that property for satisfaction of the taxpayer's liability.

The Internal Revenue Law clothes the Collector with ample power and authority to ascertain property subject to levy on the warrant of distraint. **(26 U.S.C. A., Sec. 3615 and 3654.)** These provisions give the Collector authority to examine all persons, papers, books,

accounts, and premises; to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, in connection with the collection of internal revenue. There is no evidence that the respondent availed himself of the remedies provided for by law for the satisfaction of the corporation's tax liability.

The deeds conveying the Hines property and Arlington property to the Central Holding Company were duly recorded (see original Pet. Exh. 1 (4) and 2 (1 and 2). They therefore were **public notice** to the respondent. The procedure provided for by 26 U.S.C. A. 3615 and 3654, if availed of, would have disclosed the ownership of the property and the balance of the $20,422.10 fund which remained the property of the corporation (Conley, Tr. p. 128).

Had the respondent availed himself of these remedies the assets would have been ascertained and they could have been subjected to the satisfaction of the corporation's tax liability.

It is now settled beyond question that transferee liability cannot be initiated until respondent has exhausted his remedies against the property of the taxpayer.

**Wire Wheel Corporation of America v. Commissioner, 16 B.T.A. 737-741, aff'd 46 F. (2d) 1013.** (Text in Appendix, page 27.)
**Commissioner vs. Oswego Falls Corporation, 71 F. (2d) 673.** (Text in Appendix, page 29.)
**Terrace Corporation v. Commissioner, 37 B.T.A. 263.** (Text in Appendix, page 24.)

**Gleichman v. Commissioner, 17 B.T.A. 147.** (Text in Appendix, page 30.)
**Troll v. Commissioner, 33 B.T.A. 598-604.** (Text in Appendix, page 31.)
**Florence McCall v. Commissioner, 26 B.T.A. 292.** (Text in Appendix, page 33.)

The **Troll case** is especially significant. In that case a warrant of distraint was also issued but no return of the warrant was made. The Board pointed out particularly that the deputy collector who testified failed to give details as to the efforts he made to locate assets. The Board attached high significance to the absence of a return nulla bona. The Board said:

> "It is significant that he did not return any warrant of distraint nulla bona or make any return whatsoever upon the form provided thereon for the purpose or in any other form. . . . .
> . . . . . .
> **"His conduct is open to the inference that he was not in a position as a matter of fact to make such return."**

These observations are, of course, equally applicable to the case at bar.

In the case at bar, as in the case cited, a warrant of distraint was issued but no return was ever made thereon on the required form or on any form. Thus respondent's conduct "is open to the inference that he was not in a position as a matter of fact to make such return".

In the case cited, because of the failure to make the return, the Board held that the corporation "may have had other assets on March 1, 1930 of a value sufficient

to cover all of his liabilities." In the case at bar we have not only the inference resulting from the failure to make the return, but **we have affirmative evidence of the existence of assets out of which satisfaction of the tax liability could be made.**

## POINT VII.

**There is no substantial evidence to sustain a finding that Central Holding Co. was insolvent or rendered insolvent at the time of (a) the alleged transfer, or (b) at the time the transferee proceedings were commenced.**

## SUMMARY OF ARGUMENT

The evidence establishes that the corporation had assets more than sufficient to pay its tax liability **at the time of the alleged transfer.** The evidence establishes that the corporation had assets more than sufficient to pay its tax liability **at the time the transferee proceedings were initiated.** While the return of a warrant of distraint makes a prima facie showing of insolvency, the rule does not apply in this case because no return whatsoever was made of the warrant of distraint.

## ARGUMENT

The burden of proof is upon respondent to establish insolvency of the taxpayer (Central Holding Co.) (a) at the time of the alleged transfer, and (b) at the

time of the commencement of the transferee proceeding.

In **Terrace Corporation v. Commissioner, 37 B.T.A. 263,** the transfer of assets was made July, 1933, a warrant of distraint was issued, and returned nulla bona in March, 1934—some nine months later. The transferee liability was asserted at that time and the Board held:

> "It should be kept in mind that in a transferee proceeding **insolvency** must be proved **at two basic dates: (1) at the time of the transfer of the property; (2) at the time the creditor brings his action to subject the property in the hands of the transferee to the payment of his claim.** The first is necessary in order to show that the conveyance was a fraud on the transferor's creditors. The second is necessary in order to show that the primary debtor is unable to respond to the creditor's demand and therefore a resort to a secondary liability is justified."

It was also held in that case that the respondent had the **burden of proof** to establish insolvency and until he does so "there is no obligation upon the transferee to go forward with his defense". The fact that a warrant of distraint was returned nulla bona some nine months after the transfer, does not establish that the taxpayer was insolvent at the time of the transfer.

(See text of opinion, Appendix page 24)

In **Lehigh Valley Trust Co., Executor v. Commissioner, 34 B.T.A. 528, 534,** the Board, quoting from an earlier decision held that the respondent "must prove

that the distribution of assets rendered the transferor corporation insolvent (citing cases)" and that "if the respondent does not sustain the burden of proof . . . . he fails."

In **Troll v. Commissioner, 33 B.T.A. 598,** the Board held that before transferee proceedings may be brought against a transferee it must appear that the remedies against the transferor "would be of no avail" and that the failure to prove insolvency necessitates a determination in favor of the petitioner. **In that case there was evidence that the taxpayer "had no funds", but the Board held that that was not sufficient to establish insolvency because it appeared that he had other assets and the evidence did not adequately demonstrate that they were of no value.** The same is true in the case at bar.

In **Wray v. Commissioner, 24 B.T.A. 94,** the corporation was dissolved in October, 1932 and paid a liquidating dividend but there was evidence that some assets had not been distributed. The transferee liability was assessed in 1935. The Board held:

> "The provisions of **section 280** constitute an extraordinary method of collecting the taxes of the person who is primarily liable therefor, and consequently they **must be construed strictly against the respondent.**"
>
> . . . . . .
>
> "The mere fact that a corporation is dissolved and that its assets were distributed are not of themselves sufficient to hold the distributee.
>
> . . . . . .

> ". . . The assessments were made in 1925. The record does not show that at that time the corporation or its representatives were unable to pay its alleged tax obligation or that respondent exhausted his resources in an attempt to collect from the corporation."

In this case the respondent does not have the benefit of the prima facie showing which results from the return of an execution nulla bona because the warrant of distraint bears no return.

The alleged transfer was made August 17, 1937. The taxpayer's fiscal tax year began July 1, 1937 and ended June 30, 1938. The return and payment of the income tax was due September 15, 1938.

The record discloses that all of the obligations of the corporation (except income tax liability **to accrue** at the end of that current fiscal year) were paid off out of the first insurance money received (Tr. p. 128). After the first insurance money was received ($18,000.00) and before Jacob received any money, the corporation transferred $5,000.00 to Burns, Oregon, where a bank account was opened in the name of the corporation. With a portion of this money ($2809.27) it purchased from Harney County an unfinished hotel property at Hines, Oregon, which the county had formerly acquired by tax foreclosure (see deed No. 2, Petitioners' Exhibit 1, Tr. p. 138). Title was originally taken in the name of E. W. Barnes. On the same day, Barnes conveyed the property to his wife (Deed No. 3, Exhibit 1) and thereafter Barnes and his wife **conveyed** that property together with other property

**to the Central Holding Co.** (see Deed No. 4).

The only evidence of value of the Hines property was that $2,809.27 was paid to Harney County and it was later conveyed for a consideration of $15,000.00 in the purchase of the Arlington Hotel property. No testimony was introduced as to the **actual market value.**

Assuming, without conceding, that the $20,422.10 received by Jacob and a similar amount received by Conley were corporation funds, **there still remained in the corporation the additional sum of $20,422.10.** Conley testified: (Conley, Tr. p. 128 and Pet. Exh. 5, Tr. pp. 164-166.)

Barnes, who together with his wife were the only stockholders, obviously did not distribute the remain- $20,422.10 to himself and certainly **no part of it to his wife** who was also a stockholder, but allowed it to remain the property of the corporation as he said in his letter.

This was obviously done to comply with the advice he received from Jacob that the corporation was to continue to function in the manner contemplated by the statute governing involuntary conversions. (26 U. S.C.A. 112(f)).

It appears, therefore, that at the time of the transfer the corporation owned the Hines property purchased for $2800 from the County and later transferred for a consideration of $15,000.00; and it had $20,-422.10 in cash. It had no liabilities except the income

tax liability that would accrue at the end of the fiscal year. This was the situation at the time of the alleged transfer.

In November of the same year the corporation contracted to purchase the hotel at Arlington, Gilliam County, Oregon. The transaction was consummated December 15, 1937 (Petitioners' Exhibit 2, Tr. p. 139). At that time the Arlington Hotel property was deeded to Central Holding Co. The purchase price was $50,000.00 which was paid as follows: $6313.08 in cash, $15,000.00 by conveyance of the Hines Hotel property, $5,000.00 by assuming taxes and $23,868.00 by execution of a purchase money mortgage. (Tr. p. 138) There was a slight variance in the cash (not material) by reason of the tax adjustment. The title to the property remained in the Central Holding Co. until September, 1938, when it was conveyed to Barnes without consideration (Tr. p. 138). The corporation was dissolved January 6, 1941 (Tr. p. 211).

Barnes testified that after the purchase of the Arlington Hotel, $4,000.00 was used in making repairs (Tr. p. 158); that the cash paid to Amato on account of the purchase price and the $4,000.00 he spent on repairs was paid out of the aforesaid $20,400 (Tr. p. 163).

The result was that in December, 1937, after the Arlington Hotel property was purchased by the taxpayer corporation, it owned the Arlington Hotel, purchased at $50,000.00 with obligations against it (purchase money mortgage and taxes) of $28,868.00 or an

equity in excess of $21,000.00, to which should be added $4,000.00 which was spent in repairs and improvements, making the equity worth in excess of $25,000.00.

The corporation also had left the difference between the $20,422.10 (left in the corporation) and the cash expended on account of the purchase and repairs of the Arlington Hotel property (approximately $10,000.00), which left on hand in excess of $14,000.00 in cash. Altogether, in December, 1937, the corporation had assets consisting of $25,000.00 equity in the hotel at Arlington, and in excess of $14,000.00 in cash, a total in excess of $39,000.00. There is no evidence of any other liability except the tax liability which is here involved.

We submit that upon this record there is a total failure of proof that the taxpayer was insolvent at the time of the alleged transfer of the funds to Jacob and at the time of the commencement of the proceedings to impose transferee liability upon petitioners which was initiated by the notice dated April 8, 1941 (Tr. p. 19).

Since the burden of proof of insolvency was on the respondent, and since the record discloses that the Hines property belonged to the corporation, the burden was upon respondent to establish the true market value of the Hines property.

It has been held that the purchase price paid for property is some evidence of value. That, of course, is true only in a purchase and sale at arm's length in the ordinary course of business. It does not apply to

liquidation sales, tax sales and the like. All the record discloses in this case is that it was acquired for $2800.00 and sold for $15,000.00. With the record in this condition and the burden of proof being upon the respondent it cannot be said that the property had no value or that its value was not $15,000.00. We submit that the burden was upon the respondent to establish by competent evidence **the true market value** of the Hines property and that it was not worth $15,000.00, the amount at which it was accepted by the Amato's.

## CONCLUSION

The opinon of the Court below bears every indication that it lost sight of the true issue in the case. It overlooked the fact that the proceeding is in rem; that a particular res is to be recovered and that only the one who obtained the res is liable for it. Instead it proceeded on the theory that a personal liability could be imposed on petitioners if they had acquired an equitable interest in the res and a coincident right to recover it from Jacob, who obtained it "upon a claim of right" as his own.

It is immaterial whether Jacob's claim of ownership is well founded in law or not. **The fact remains that he alone has possession of the res being followed.** And it is immaterial whether petitioners are in law or in equity entitled to recover the res from Jacob. The fact remains that they did not obtain possession of the res being followed. Until they assert and enforce their

right to possession (if they have any) they are not transferees and could not be held liable in a judgment creditor's suit.

Petitioners cannot be charged with possession merely because they might have a right (questionable) to possession as against one who has the actual possession and retains it "under a claim of right."

Throughout the opinion the emphasis is placed on Jacob's **intention** to give the stock to petitioners. There never was any issue in this respect. Jacob so asserted in the memorandum attached to his personal income tax return, in his petition to review the transferee liability assessed against him and in his testimony in this case. **The fact remains that he did not carry out but abandoned his intentions when the conditions changed.** As a matter of law he had the right to do so and accordingly received and retained the proceeds from the sale of the stock as his own.

We submit that his abortive intention cannot and does not place petitioners in possession of the res.

**To impose liability on petitioners under the facts in this case is to penalize them because Jacob changed his mind about giving them the stock.**

It is also evident that the court below misconstrued the true import of the transferee statute, for it said:

> "The liability having attached under the statute any subsequent appropriation by Jacob to his own use of the funds so received by him for petitioners cannot affect their liability herein."

It has been repeatedly stated by the courts, including the Supreme Court, that the statute did not create any liability and that it only afforded an additional summary remedy to enforce the liability at law or in equity where one already existed. This was not a case where petitioners first came into possession of the res and thereby became liable as transferees, and later it was appropriated by Jacob. Here the liability never attached to petitioners because they never received the res.

The transferee liability, if any, attached to Jacob at the very moment he received the res as his **own**, not by virtue of the statute but because it was in legal contemplation a "trust fund". There was no subsequent change of possession which would transfer to or impose the liability on petitioners.

It has also been demonstrated that the fund in question was not a liquidating dividend; that the corporation was not liquidated or dissolved but continued thereafter as a going concern. Hence the fund cannot in law or in equity be regarded as a trust fund.

It has also been demonstrated that the corporation (taxpayer) was solvent at the time of the alleged transfer and at the time the transferee proceedings were initiated; that at both these times it owned assets more than sufficient to take care of the $6,000.00 tax liability; and that the respondent utterly failed not only to exhaust the available remedies against the taxpayer which would have resulted in satisfaction of the

tax liability but to make any reasonable effort in that direction, which had any potency to subject taxpayer's assets to the satisfaction of this obligation.

**As to the exhaustion of remedies there is no finding of fact whatsoever and this alone is fatal to the judgment of the court below.**

The Court below also lost sight of the fact that in this case the burden of proof upon every material fact was upon respondent. This is manifest because the Court below in a number of instances drew an inference adverse to petitioners from the alleged absence of evidence on a given fact. That would be true only if petitioners had the burden of proof, but since the respondent had the burden of proof, the Court below should have drawn an inference adverse to respondent.

In 22 C.J. 112 the text is as follows:

> "**Force of presumption.** The unfavorable presumption or inference arising from the withholding of evidence is not, of course, conclusive against the party, but is merely a fact for the consideration of the jury; and **such failure cannot be relied upon by the other party as affirmative proof of the facts as to which the burden of proof is upon him,** although it may turn the scale where the evidence is closely balanced."

The Court below committed error in its failure to appraise the evidence and the absence of evidence in accordance with the legal standards.

Under these circumstances the decision of the court below should be reversed.

S. J. BISCHOFF,
Attorney for Petitioners.

# APPENDIX

## APPENDIX

In **Higley v. Commissioner, 69 Fed. (2d) 160 (8th Cir.)**, the court held:

"If a trust beneficiary is to be personally liable under this section, it must be because he is a 'transferee'. In a broad sense, **and irrespective of this section,** such a beneficiary might be regarded as a "transferee" under a trust instrument. In the same sense, a **trustee,** who takes the entire legal title, is **certainly** a **'transferee'** under such an instrument. In short, one (the trustee) would **always** be regarded as a transferee and the other (the beneficiary) **might be** so regarded. The question here is the meaning intended in this section. The section expressly covers transfers **other than** trusts. The employment of the word 'transferee' must apply to such other transfers, and the presence of the word is readily explainable in that connection. But, in addition, the word 'trustee' is employed in connection with trusts only. The result is that the **application** of 'transferee' **to trust beneficiaries** is **at least doubtful** and the **statute** in that **respect ambiguous.** In such a situation the beneficiary is entitled to a favorable construction because liability for taxation must clearly appear. Miller v. Standard Nut Margarine Co., 284 U.S. 498, 508, 52 S. Ct. 260, 76 L. Ed. 422; U. S. v. Updike, 281 U.S. 489, 498, 50 S. Ct. 367, 74 L. Ed. 984; U. S. v. Merriam, 263 U.S. 179, 187, 188, 44 S. Ct. 69, 68 L. Ed. 240, 29 A.L.R. 1547.

"Passing from consideration of this section **alone** to consideration of it **as a part of the general scheme of collecting this estate tax,** the position of petitioner is further strengthened. Throughout this chapter (estate taxes) runs the clear plan as to collection. The prime reliance is the **property** subject to the tax. Upon this a lien

for the taxes is placed. As further assurance, a personal liability is placed upon those who are in position to dispose of the property and possibly delay or defeat collection. Upon them is placed a strong personal incentive to see that the tax is properly and promptly paid. **This burden is placed only upon those** (executors, administrators, fiduciaries, transferees, trustees, and insurance beneficiaries) **who have such legal title, control, and possession as would afford opportunity to dispose of the property primarily liable for the payment of the tax.** A trust beneficiary may or may not occupy such a position, dependent upon the terms of the trust, but all opportunity for him to take advantage thereof is anticipated and guarded against by placing upon the trustee a personal liability and by attaching the lien to the trust property. Although Congress has legislated repeatedly in this matter, it has in no instance used language clearly providing personal liability of a cestui que trust."

In **Section 75 of the Restatement of the Law of Trusts,** the rule is stated as follows:

"AN INTEREST WHICH HAS NOT COME INTO EXISTENCE OR WHICH HAS CEASED TO EXIST CANNOT BE HELD IN TRUST."

"COMMENTS: . . . . .

Thus if a person **gratuitously declares himself trustee** of such shares as he may thereafter acquire in a corporation not yet organized, **no trust is created.** The result is the same where instead of declaring himself trustee, he purports to transfer to another as trustee such shares as he may thereafter acquire in a corporation not yet organized. In such a case **there is at most a gratuitous undertaking to create a trust in the future,** and such an undertaking is not binding as a contract, for lack of consideration . . . .

C. WHERE SETTLOR SUBSEQUENTLY ACQUIRES AN INTEREST. If a person purports to declare himself trustee of an interest not in existence or if he purports to transfer such an interest to another in trust, no trust arises even when the interest comes into existence in the absence of a manifestation of intention at that time (see § 26)."

In **Brainard v. Commissioner, 91 Fed. (2d) 880 (7th Cir.)**, the petitioner

". . . . declared a trust of his stock trading during 1928. . . . to distribute the profits, if any, in equal shares to his wife, mother and two minor children after deducting reasonable compensation for services . . at the end of the year determined his compensation . . . which he reported in his income tax return for that year. The profits remaining were then divided into approximately equal shares among the members of his family, and the amounts were **reported in their respective tax returns for 1928.** The amounts allocated to the beneficiaries were credited to them on taxpayer's books, but they did not receive the cash, except taxpayer's mother, to a small extent."

The Circuit Court of Appeals held:

"It is obvious, therefore, that the taxpayer based his **declaration of trust** upon an interest which at that time had not come into existence and in which no one had a present interest. In the Restatement of the Law of Trusts, Vol. 1, section 75, it is said that **an interest which has not come into existence or which has ceased to exist cannot be held in trust.** It is there further said: "A person can, it is true, make a contract binding himself to create a trust of an interest if he should thereafter acquire it; but such an agreement is not binding as a contract unless the requirements of the law of Contracts are complied with . . . .

"Thus, **if a person gratuitously declares himself trustee of such shares as he may thereafter acquire in a corporation not yet organized, no trust is created.** The result is the same where instead of declaring himself trustee, he purports to transfer to another as trustee such shares as he may thereafter acquire in a corporation not yet organized. **In such a case there is at most a gratuitous undertaking to create a trust in the future, and such an undertaking is not binding as a contract for the lack of consideration.**

". . . . **If a person purports to declare himself a trustee of an interest not in existence, or if he purports to transfer such an interest to another in trust, he is liable as upon a contract to create a trust if,** but only if, the requirements of the law of Contracts are complied with. See also Restatement, section 30b; Bogard, Trusts and Trustees, Vol. 1, section 112. In 42 Harvard Law Review 561, it is said: 'With logical consistency, the courts have uniformly held that an **expectancy cannot be the subject matter of a trust and that an attempted creation, being merely a promise to transfer property in the future, is invalid unless supported by consideration.**' (Citing Lehigh Valley R. R. v. Woodring, 116 Pa. 513.) Hence, it is obvious under the facts here presented that taxpayer's declaration amounted to nothing more than a **promise to create a trust in the future,** and its binding force must be determined by the requirements of the law of Contracts.

. . . . . .

"From what has been said we are convinced that appellant's profits in question were **not impressed with a trust when they first came into existence.**"

In **Weil v. Commissioner, 31 B.T.A. 899, Affirmed, 82 Fed. (2d) 561 (5th Cir.), certiorari denied, 299 U.S. 552,** the taxpayer was the owner of a block of stock of the Coca Cola Company. On October 1, 1930, he took

out eight certificates representing 800 shares of said stock and he placed certificates representing 200 shares in envelopes bearing the name of each of his four minor children. He had kept these envelopes bearing the names of his children for sometime prior to this transaction. In these envelopes there were other securities belonging to the children. He made a memorandum of the certificate numbers that he placed in each of the envelopes and when he returned to his office he made or caused to be made entries in a memorandum book in which were recorded the securities owned by the children. On October 1, 1930, he withdrew from his own stockholdings certificates representing 400 additional shares and placed certificates representing 100 shares in each of the envelopes belonging to the children and again appropriate entries were made in the aforementioned memorandum book. Later petitioner gave instructions to sell for his children 200 shares each of the said stock with directions that the proceeds should be placed to the credit of the children on the books of the firm of which he was a member. The stock was sold on the market and a **sales slip showed that the sales were for the account of the children.** Appropriate credits were given to the children's accounts in accordance with the direction. He did not recall whether he had endorsed the certificates but was of the impression that he did. Later he gave instructions to sell 100 shares each of the children's stock and the same procedure was followed. The accounts of the children on the books of the firm had been carried for some time prior to this transaction involving other moneys

belonging to the children as to which there was no dispute. These moneys were advanced to the firm and interest was paid to the children. They were carried on the books of the firm as loans from the children to the partnership. Petitioner had been making gifts to his children since their birth. One of the children became of age and the money was turned over to her but was thereafter managed by her father under a power of attorney, but she had a right to do with it as she pleased. He never used any of the stock or proceeds from the sale of stock for his own purpose as collateral or otherwise. The certificates had not been transferred on the books of the Coa Cola Company because he expected to sell them and wished to avoid the expense of the transfer. Petitioner was not appointed guardian of the estate of the children. A part of the proceeds of sale was later reinvested in bonds and stock, the stock being issued in the children's names. **Upon these facts** the **Commissioner contended** that the **gift of the stock had never been consummated,** that at the time of the sale of the stock it was the property of the petitioner (father) and that the profit derived from the sale of the stock was taxable as his income and not as income of the children. The petitioner contended that the gift of the stock had been completed and that the sale was for the account of the children.

The **Board and Circuit Court of Appeals,** holding that the stock was the property of the father and that the profit from the sale of the stock was taxable as his, said:

"From an examination of the authorities we find the essential elements of a bona fide gift inter vivos to be (1) a donor competent to make the gift; (2) a donee capable of taking the gift; (3) a clear and unmistakable intention on the part of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject matter of the gift, in praesenti; (4) the irrevocable transfer of the present legal title and of the dominion and control of the entire gift to the donee, so that the donor can exercise no further act of dominion or control over it; (5) a delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it; (6) acceptance of the gift by the donee; Edson v. Lucas, 40 Fed. (2d) 398, and authorities there cited. Cf. Allen-West Commission Co. v. Crumbles (C.C.A., 8th Cir.), 129 Fed. 287; Edwin J. Marshall, 19 B.T.A. 1260; affd. (C.C.A., 6th Cir.) 57 Fed. (2d) 663, certiorari denied, 282 U.S. 61.

. . . . . .

"The important question here is not whether there was a gift by petitioner to his children, but whether there was a **gift of the Coca-Cola stock** to them. Was there a clear and unmistakable intention on the part of the donor to give the Coca-Cola stock to his children; to absolutely and irrevocably part with the title, dominion, and control of it at the very time the gift was made, or did he intend all the while to sell the stock and give the proceeds thereof to his children?

. . . . . .

"Under all the circumstances we conclude that what petitioner intended to give his children and **what he gave them was not the stock itself, but the proceeds from the sale of the stock.** It follows from this conclusion that the determination of the respondent must be approved."

On appeal the Circuit Court of Appeals held (82 Fed. (2d) 561):

> "We think the controlling fact is that Weil purposed all the time to sell the stock and kept control of it to do so. He was not the guardian of the children, and it is conceded that under the law of Alabama he could not sell the property of his minor children. It is plain that he intended to give his children the benefit of the stock, and perhaps went to great pains to make it appear that he had done so before the profit was realized which would be taxed in solido if his, but in separate parts and less severely if his children's; but all the time he intended to and did maintain dominion and control over the stock so as to sell it. Prior to the several sales the certificates sold never passed out of his custody into the control of any other person, they were never endorsed to the children or put in their names, nor was any writing signed and delivered by him purporting to convey them. This retention of control for the purpose of exercising dominion over them by sale is inconsistent with a present absolute gift, the legal result of which would have been to prevent a sale.
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> . . . . . .
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> "We do not doubt that a certificate of stock may without formal transfer be by such a delivery given; and if to a minor such parting of control and dominion to a third person for the child is sufficient. Whether a father may deal wholly with himself for his child without writing, without cooperation of any third person who represents the child, without doing what is ordinarily done to transfer this kind of property, and without parting with control over the certificate, we greatly doubt. Generally a donor must go as far as the nature of the property and the circumstances reasonably permit in parting with dominion and making the gift irrevocable. See Allen-West Commission Co. v. Crumbles, 129 Fed. 287; Conlon v. Tur-

ley, 10 Fed. (2d) 890; Lee v. Lee, 5 Fed. (2d) 767; Union Trust Co. v. United States, 54 Fed. (2d) 152; Moore v. Tiller, 61 Fed. (2d) 478; Jackson v. Commissioner, 64 Fed. (2d) 359. If the donor intends to give, and even goes so far as to transfer stock on the books of the company but intends first to do something else and retains control of the transferred stock for that purpose, there is no completed gift. Southern Industrial Institute v. Marsh, 15 Fed. (2d) 347. Weil's intention to sell the stock, an intention that could not be carried out if the title to it were vested in his minor children, accompanied with the retention of full control over it, suspended the execution of the intention to make a gift until after the sale, and the intended gift took final effect only upon the proceeds. The case of Smith v. Commissioner, 59 Fed. (2d) 533, is not to the contrary. The law was there asserted to be as we have stated it. Title to the stock certificates there was held to have passed from the donor to the donees not when he declared to them the gift and wrote upon the folder which was to receive the certificate and made entries on his books, but only when after endorsement of the certificates he placed them in the lock-box at the bank of one of the donees. That the donor had a key to his son's lock-box was held not necessarily to defeat the delivery, since the son knew of it and also had a key.

"The dissenting opinion of members of the Board suggests that Weil made himself trustee for his children with power to sell the stock. The cases cited for that idea dealt with formal written declarations of trusts. There was here no valuable consideration and no basis for equity to construct a trust. If there was a trust, it must have been an express trust. The evidence to establish a voluntary express trust in personal property must show a clear intention to create a trust. Equity will not make one where none has been clearly declared. **A defective or imperfect gift will not be**

**converted into a trust.** Elliott v. Gordon, 70 Fed. (2d) 9; Eschen v. Steers, 10 Fed. (2d) 740. No evidence has been brought to this court, and certainly no trust was found as a fact by the Board. Weil, who best knows what he did, has never claimed one. In his petition for redetermination by the Board he asserts that on Oct. 1st, 1930, and Nov. 1st, 1930, he made 'gifts inter vivos to each of his said minor children,' and 'that the gifts inter ivivos of the common stock of Coca-Cola Company which were made by him to his four minor children were bona fide, and that the subject matter of the said gifts thereupon became the absolute property of his four minor children.' Even after the suggestion of the minority opinion, Weil in his petition for review in this court alleges that there were absolute gifts to his minor children, and his assignment of error is that the Board erred in not finding that he 'made completed and absolute gifts of the stock in question to his four minor children.' His brief makes no claim that a trust was attempted."

In **Tait, Collector, vs. Western Maryland Ry. Co., 289 U.S. 620—53 Sup. Ct. 706,** the court held:

"The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the **point or question to be determined in the later action is the same as that litigated and determined in the original action.** Cromwell v. County of Sac, 94 U.S. 351, 352, 353, 24 L. Ed. 195; Southern Pacific R. Co. v. United States, 168 U.S. 1, 48, 18 S. Ct. 18, 42 L. Ed. 355; United States v. Moser, 266 U.S. 236, 241, 45 S. Ct. 66, 69 L. Ed. 262. Since the claim in the first suit concerned taxes for 1918

and 1919 and the demands in the present actions embraced taxes for 1920-1925, the case at bar falls within the second class. The courts below held the lawfulness of the respondent's deduction of amortized discount on the bonds of the predecessor companies was adjudicated in the earlier suit. The petitioner (collector) admitting the question was in issue and decided in respect of the bonds issued by the second company, and denying, for reasons presently to be stated, that this is true as to the bonds of the first company, contends that as to both the decision of the Court of Appeals is erroneous, for the reason that the thing adjudged in a suit for one year's tax cannot affect the rights of the parties in an action for taxes of another year.

"As petitioner says, the scheme of the revenue acts is an imposition of tax for **annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.**

"This court has repeatedly applied the doctrine of res judicata in actions concerning state taxes, holding the parties concluded in a suit **for one year's tax** as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. (Cases.) . . . . The **public policy** upon which the rule is founded has been said to apply with **equal force to the sovereign's demand** and the claims of private citizens."

. . . . . .

"Is the **question or right** here in issue the same as that adjudicated in the former action? The pertinent language of the revenue acts is identical; the regulations issued by the Treasury remained unchanged; and of course the facts with respect to the sale of the bonds and the successive owner-

ship of the railroad property were the same at the time of both trials. The **petitioner suggests, however,** that **significant** facts **were stipulated in the present case which were not made to appear in the former** proceeding. He shows that in the earlier case the Commissioner inadvertently stipulated that the first company 'may be taken as identical' with the second, whereas in the present suit the exact devolution of title from the first to the second through the foreclosure and reorgaization is definitely exhibited by the stipulation of the parties. From this he concludes that the Circuit Court of Appeals might well have reached a different result on the merits, if the former case had been more fully and accurately presented. But the Circuit Court of Appeals has found that all the facts stipulated in the present cause were before it in the former one, and we accept this finding. It holds also that the former decision was based on a view of the law quite as pertinent to the bonds sold by the first company as to those marketed by the second. The petitioner may not escape the effect of the earlier judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as in the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment. Compare Deposit Bank v. Frankfort, 191 U.S. 499, 510, 511, 24 S. Ct. 154, 48 L. Ed. 276. The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding.

"As we have seen, the demand for refund of 1918-1919 taxes was against the Commisisoner of Internal Revenue. The present suits are against the United States and the collector. Are the parties the same **or in such privity** that the claimed estoppel binds them? The petitioner concedes that the former judgment is, so far as identity of parties is concerned, conclusive in the suits in which

the United States is now the defendant, since the Commissioner acted in the earlier suit in his official capacity and as representative of the government. This leaves for consideration the question whether the Commissioner and the collector are for purposes of application of the rule of estoppel, to be regarded as different parties.

"In a suit for unlawful exaction the liability of a collector is not official but personal. (Cases.) And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. Bankers Pocahontas Coal Co. v. Burnet, 287 U.S. 308, 311, 53 S. Ct. 150, 77 L. Ed. 325. We think, however that where a question has been adjudged as between a taxpayer and the government or its official agent, the Commissioner, the collector, being an official inferior in authority and acting under them, is in such privity with them that he is estopped by the judgment. See Second National Bank of Saginaw v. Woodworth (D.C.) 54 F. (2d) 672; Bertelson v. White (D.C.) 58 F. (2d) 792."

Summarizing that decision the Supreme Court held that the doctrine of **estoppel is applicable** where the **causes of action** are **not the same,** if a particular **issue** was determined that was **common to both proceedings** or if the issue established the **status of the taxpayer,** and it also determined that estoppel is available not only where the parties are the same in both proceedings, but are also available for and against the parties in **privity with them.**

In the case at bar the issue as to the ownership of the stock, and hence the ownership of the fund alleged to be the liquidating dividend, is common to both proceedings. It is upon the determination of that issue that

the status of transferee must be determined and since respondent proceeds on the theory that petitioners are assignees or donees of Robert T. Jacob they must be deemed in privity with him.

In U. S. v. **Moser,** 266 U.S. 236, 45 S. Ct. Rep. 66, the Supreme Court held:

> "The general principles are well settled, and need not be discussed. The scope of their application depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits constitutes an absolute bar to the subsequent action. In the latter case the inquiry is whether the **point** or **question** presented for determination in the subsequent action is the same as that litigated and determined in the original action. Cromwell v. County of Sac, 94 U.S. 351, 352, 353, 24 L. Ed. 195. The rule is succinctly stated in Southern Pacific R. R. Co. v. United States, 165 U.S. 1, 48, 18 S. Ct. 18, 27 (42 L. Ed. 355):
>
> "The general principal announced in numerous cases is that a **right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction,** as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and **even** if the second suit is **for a different cause of action,** the right, question or fact once so determined must, as between the **same parties or their privies,** be taken as conclusively established, so long as the judgment in the first suit remains unmodified."
>
> "And in New Orleans v. Citizens' Bank, 167 U.S. 371, 396, 17 S. Ct. 905, 913 (42 L. Ed. 202) this court, speaking through Mr. Justice White, said:
>
> 'The estoppel resulting from the thing adjudged does not depend upon whether there is the

**same demand in both cases,** but exists, even although there be different demands, **when the question upon which the recovery of the second demand depends, has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.'**

"And see Myers v. International Co., 263 U.S. 64, 44 S. Ct. 86, 68 L. Ed. 165.

"The suits here are upon different demands and the point at issue is to be determined by applying the second branch of the rule. The question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged in favor of the claimant in the three preceding suits, viz. whether he occupied the **status** of an officer who had served during the Civil War.

. . . . . .

"A determination in respect of the status of an individual upon which his right to recover depends is as conclusive as a decision upon any other matter. Clemens v. Clemens, 37 N.Y. 69, 72; Pittsford v. Chittenden, supra.

"Affirmed."

In **U. S. v. Brown, 86 Fed. (2d) 798 (6th Cir.),** the corporation was dissolved and the cash distributed to the three stockholders as liquidating dividends without making deduction for corporate tax liability. The government brought suit to charge the stockholders with transferee liability. While the suit was pending the Commissioner assessed the stockholders with a tax on the profit derived from the liquidating dividends (difference between the cost of the stock and the amount received). Each of the stockholders filed a petition with the Board, claiming, among other things, that in determining profit there should be deducted a

proportionate share of the amount of the transferee liability asserted against them. The Commissioner contended that the entire amount received less cost of the stock was profit and that no deduction should be made for the unpaid tax. The Board sustained the contention of the Commissioner. No appeal was taken and the decision became final. The stockholders set up this election and determination as a bar to the suit to charge them as transferees. The District Court ruled that the Commissioner was estopped by the election and the Circuit Court of Appeals, in affirming the decision, held that the Commissioner "cannot now pursue the inconsistent remedy" of transferee proceeding; that the former proceeding **"unequivocally constituted an election"** because the fund could not be income to the petitioner and at the same time be a "trust fund" subject to transferee liability and that respondent could not pursue both courses. The Court held:

> "The District Court held that the Government was estopped by the decision of the Board of Tax Appeals, and that by pressing that litigation to judgment the Government had elected not to attempt to enforce the transferee liability against the taxpayers, and therefore could not recover.
>
> "While it has been held in the Court of Claims (Warner Co. v. United States, 15 Fed. Supp. 160) that estoppel by judgment may arise out of a decision by the Board of Tax Appeals from which no apeal has been taken, it is not necessary to consider that question, as the **Commissioner made a binding election** in the proceedings **before** the **Board** and **can not now pursue** the **inconsistent** remedy of the equity action.

"The Government contends that as the doctrine of election is based upon a freedom of choice between inconsistent remedies (Wm. W. Bierce, Ltd., v. Hutchins, 205 U.S. 340), it is inapplicable here. It urges that the Commissioner had no choice between charging the unpaid taxes as a liability to be enforced by transferee proceedings and also assessing as personal income the entire liquidating dividends without making any deduction for transferee liability.

"This argument ignores the fact that the Commissioner in 1926 filed this bill in equity on the theory that the taxpayers as transferees held an amount equivalent to the unpaid corporation taxes in trust for the Government. Answers were filed and issue was joined before proceedings in the Board of Tax Appeals were instituted. The decision of the Board was rendered November 22, 1932. If the instant suit had been prosecuted and the Commissioner had obtained a judgment, the corporation taxes would have been paid long before the decision of the Board, and the amount assessed in those proceedings would have required reduction by the amount of the recoverable corporation taxes. The Commissioner exercised a freedom of choice. He chose to press the tax appeal proceedings, and this unequivocally constituted an election. Cf. Robb v. Vos, 115 U.S. 13, 43. So far as the corporation taxes were concerned, the Government could avail itself of one of two remedies. The money could not constitute income to the taxpayers and also a fund charged with a trust in favor of the Government. The Governmen could bring the transferee action on the theory of trust, or in the alternative, it could claim that all of the liquidating dividends constituted personal income to the taxpayers. It could not pursue both courses. It deliberately chose that the instant case should slumber in the files, and pressed the personal assessment on the theory that the entire amount of liquidating dividends consti-

tuted income. The Government is bound by its election. United States v. Oregon Lumber Co., 260 U.S. 290, 301. The Commissioner concedes that there is a 'certain equity' in the position of the taxpayers, and the court rightly so considered.

"The decree is affirmed."

In **U. S. v. Boss & Peak Automobile Co., 285 Fed. 410 (D.C. Ore.), aff'd 290 Fed. 167 (9th Cir.)**, the government sued C. L. Boss and E. W. A. Peake **as transferees** to recover from them a deficiency in tax asserted against Boss & Peak Automobile Co., a corporation which had been engaged in the automobile business.

**Boss contended** that the transaction between him and Peak was a **dissolution** of the corporation and distribution of its assets, and hence both were liable in proportion to the amount of the assets they received. **Peak contended** that the transaction was a **sale** of stock by him to Boss; that the consideration for the sale came from Boss and that Peak was not a transferee of assets of the corporation. The trial court held the transaction to be a sale of stock by Boss & Peake and that **Boss alone was the transferee** of the corporate assets which he **used in acquiring Peak's stock,** and that Peak was not a transferee, and rendered judgment against Boss only.

The facts and questions involved are very closely analogous to the case at bar. Boss and Peak each owned one-half of the capital stock of the corporation. They decided to part company and discussed the matter for some months. The negotiations between them were oral and their testimony with respect to the na-

ture of the transaction was diametrically opposed. Boss testified that they discussed dissolution of the corporation and division of the assets and was largely corroborated by the testimony of an employee. Peak testified that in all of their negotiations they discussed merely a sale of the stock by Peak to Boss at a price equal to his one-half interest in the corporation.

The transaction was consummated as follows:

After Boss and Peak came to an oral understanding (but the stock had not been transferred and Peak had not been paid) Boss proceeded to raise the money with which to acquire the stock. He caused a meeting of the stockholders of the corporation to be held at which he treated himself as the owner of all of the stock except two nominal shares. At that meeting, a resolution was adopted for the transfer of all of the assets of the corporation to a partnership composed of Boss and McRell, who had but a nominal interest, and he caused the corporation to execute a bill of sale of the assets to the partnership.

Boss borrowed $8,537.15 from the corporation, giving it his note. This money Boss deposited to his own account. He borrowed $8,000.00 from another source and deposited that in his own account. The partnership borrowed $9,600.00 from Peak, executing the partnership notes to Peak and the notes were secured by conveyance of Hudson automobiles **which the partnership acquired from the corporation.** The partnership gave this money to Boss which was likewise deposited to his bank account, thus making up a total

of $26,137.15 for which amount he drew a check and delivered the same to Peak. At the same time, Peak endorsed and delivered the stock to Boss. This concluded the transaction so far as Boss and Peak were concerned and shortly thereafter Boss caused the corporation to be dissolved.

The trial court said that so far as the evidence of the oral negotiations was concerned, "Standing alone, and according to the witnesses' full credibility, Boss would have the preponderance of the evidence in his favor."

**But considering what was actually done,** the court held:

> "We have in what took place the **physical facts** which in their evidentiary character are potent and scarcely to be disputed. In short, Boss assembled his funds and placed them in the bank to his credit so that he could draw against them. Thereupon he drew his check to the order of Peak and delivered it to him. At the same time, Peak's stock was assigned in accordance with their understanding and thus the transaction was closed."

Nothwithstanding the fact that **Boss used the assets of the corporation with which to acquire Peak's stock,** the trial court held:

> "Considering all the testimony, and the manner in which the parties have treated the subject-matter of their adjustment, I am impelled to the conclusion that the agreement consisted in the **sale** by Peak of his capital stock in the Boss & Peak Automobile Company to Boss for the lump consideration of $25,000.00, . . . . and that it was **not for a dissolution of the corporation and a divi-**

**sion and distribution of its physical assets between them.** As between Boss and Peak, therefore, the former is liable for the entire tax, and the latter should not be held accountable for any of it."

. . . . . .

"The government bases its remedy against Peake upon the hypothesis that he was a stockholder in the Boss & Peake Automobile Company when and at the time it was dissolved, and that he came into possesison of a portion of its property in the way of distribution sufficient in value to pay the remainder of the tax due, and therefore that he is liable. In other words, it is argued that Boss and Peake received the then existing assets of the corporation, and that it is immaterial to the government as to what form the distribution took, so long as the assets of the corporation were actually depleted by the stockholders, whether Peake received his portion in form as part of the purchase price of his stock or as a distribution of the assets.

"It must be conceded that where, upon the dissolution of a corporation, its assets are distributed among the stockholders, the stockholders become liable to the creditors of the corporation, at least to the extent of the property receiced by them. This is referable to the so-called **trust doctrine.** As we have seen, Peake sold his stock to Boss. Having the stock, the Boss & Peake Automobile Company, through Boss, as president, and McRell, to whom was assigned one share of stock as secretary, by bill of sale, sold and transferred the entire assets of the corporation to the C. L. Boss Automobile Company. The sale was in due time ratified by the stockholders, Boss representing 298 shares of the stock at the time. In all this Peake had no part.

"Availing themselves of the corporation assets, Boss and McRell were enabled to, and did, organize the C. L. Boss Automobile Company, a co-

partnership; Boss giving to McRell such interest only as McRell was able to purchase and pay for. The copartnership having been organized and established as an entity capable of holding the assets of the corporation transferred to it, Boss and McRell were so equipped that they thereupon, through the usual formalities, dissolved the corporation at a time when it possessed no assets for distribution. Again, in neither the formation of the copartnership nor the dissolution of the corporation did Peake have a hand. The logical sequence was that Boss acquired all the assets of the corporation, and utilized them as his capital in the copartnership, and this by reason of the fact that he had acquired Peake's stock. Otherwise, he could not have accomplished his purpose simply because Peake would not have allowed it. Applying the trust doctrine, it would follow that Boss, and not Peake, would be liable for the debts of the corporation, and with them the tax in question. Aside from this, it must be borne in mind that Boss assumed the liabilities, and Peake was to be relieved of them."

. . . . . .

"It is said that Peake depleted the assets of the corporation, and that for this he is liable. What he did, so far as the record shows, was to loan the C. L. Boss Automobile Company $9,600, and take as security for the payment thereof mortgages on certain cars, which were previously a part of the assets of the corporation. The money was advanced to the copartnership by check, and by it turned over to Boss, who utilized it in paying Peake in part. The copartnership was left, as we have seen, owing Peake the amount of the $9,600. The result was that a part of the previous assets of the corporation, but now the property of the copartnership, was thus incumbered in favor of Peake. Another circumstance is that Boss borrowed $8,537.15 from the corporation on his note, and with this paid Peake, in part, the consideration for which he sold his stock.

"Whether this amounted to a depletion of the assets of the corporation may be questioned, even though the property had not passed to the copartnership. In the one case, the entity had the money, which was a lien upon the cars hypothecated, and in the other it had the note of Boss, the equivalent, supposedly, of the money withdrawn from its coffers. But, however that may be, a mere depletion of assets, unless accompanied by fraud, with the view of overreaching creditors, does not afford basis for an equitable action to recover against the party receiving the assets withdrawn. Dividends are paid out every day, which action in itself is a depletion of assets accumulated; yet no one thinks, when the corporation has gone into liquidation or insolvency, of suing to recover such dividends. So in the present case, unless the supposed depletion is referable to the so-called trust doctrine, which it manifestly is not, the government cannot have remedy on that account. I was impressed at the trial that, Peake having received money, which came from the corporation, sufficient to cover the tax due, he would be rendered liable thereby; but, from the foregoing considerations, obviously this cannot be the rule.

"The government will have a decree against C. L. Boss for the amount of the tax due, with interest and penalty. The bill of complaint will be dismissed as to E. W. A. Peake, and the cross-bill of Boss and Peake Automobile Company and C. L. Boss against Peake will also be dismissed, with costs to Peake against Boss."

On appeal this court, among other things, held:

"We might content ourselves with the mere statement that this finding, based as it is on conflicting testimony taken in open court, should not be disturbed on appeal. But an independent review of the testimony leads to the same conclusion. . . . . **No doubt a dissolution was contemplated at least as early as June 1st, and probably Peak**

**had notice of that intention. But why should that concern him? As soon as he had disposed of his stock, the fate of the corporation rested in other hands, and he was thereafter powerless to insist upon a dissolution even if he so desired.**

**"The fact that the selling price of the stock was fixed at approximately half the value of the assets of the corporation is of little significance, in view of the fact that each party owned half of the stock. . . . . On the entire record we are satisfied that the present claim that there was a dissolution of the corporation and a division and distribution of its assets among stockholders on June 1st is a mere after-thought, to escape liability for the tax.** So far as the record discloses, there was then no reason why there should be a dissolution of the corporation, or a division and distribution of its assets, rather than a transfer and sale of the Peak stock, or why the transaction should assume one form rather than the other. There was a transfer of stock in form at least, and we are satisfied there was a transfer in fact and in law." . . . . . .

"There is no error in the record, and the decree is therefore affirmed."

In **Terrace Corporation v. Commissioners, 37 B.T.A. 263,** the transfer of assets was made July, 1933, a warrant of distraint was issued, and returned nulla bona in March, 1934—some nine months later, and the transferee liability was asserted at that time. It was stipulated that the transferor was insolvent from and after the assessment of the dificiencies. The **record did not show whether the taxpayer was solvent or insolvent at the time of the transfer of assets.** The Board held:

"If petitioner is correct in point 1, then we need go no further. One of the essential things which

the Commissioner must prove to fix transferee liability in equity upon a transferee of assets is that the **transfer** was either **made while** the **transferor was insolvent** or else **resulted in insolvency** of the transferor, or, in the case of a corporation, was one of a series of distributions in liquidation which resulted in its insolvency.

. . . . . .

"There can be no question but that if Aycock was insolvent at the time the transfer in question was made to petitioner, Terrace Corporation, or if such tranfer rendered him insolvent, such transfer was a fraud upon his creditors and the Government would have a right to proceed against petitioner as a transferee. An **insolvent** debtor cannot make an effective transfer as against his creditors of his property to a corporation which he forms, in exchange for its capital stock (and for the purposes of his discussion we will treat all of the stock of petitioner as having been issued to Aycock or his nominees). First National Bank of Chicago v. Trobein Co., 59 Ohio St. 316; Allen v. French, 178 Mass. 539. It seems **equally well settled** that a **solvent individual** who is not rendered **insolvent** thereby, **may freely convey his property** to whomever he pleases, no actual fraud being shown.

. . . . . .

"Petitioner concedes that the stipulated facts show that Aycock was insolvent from and after the assessment of deficiencies against him in March, 1934, but contends that these facts fall short of showing that Aycock was insolvent on July 12, 1933.

"In this contention we think **petitioner must be sustained.** It may well be that respondent could have proved that the transfer which Aycock and his wife made to petitioner on July 2, 1933, was made while he was insolvent or that the transfer itself rendered him insolvent, but he did not prove

it and we know of no authority for us to supply by inference what respondent has failed to prove. The statute places the burden of proof to show transferee liability upon respondent and that means that he must prove all elements which are necessary to make out a prima facie case. He has not made out in the instant case such a prima facie case and there is no obligation upon the transferee to go forward with his defense until respondent has done so.

"It is undoubtedly true that if respondent had proved that Aycock was insolvent at the time he and his wife made their conveyance of the homestead property to petitioner, or immediately thereafter, the petitioner would not be heard to claim that it was an innocent purchaser for value. The rights of an innocent purchaser for value would not be a valid defense available to petitioner, a transferee corporation, under such circumstances. Clark v. Walter T. Bradley Coal Co., 6 App. D.C. 437; Roberts v. Hughes, 86 Vt. 76; 83 Atl. 807.

"But, as we have already pointed out, a transferee does not have to enter upon his defenses until the complaining creditor has made out a prima facie case, and the trouble in the instant case is that respondent has not proved that Aycock was **insolvent** when he made the transfer nor has he proved that such conveyance resulted in Aycock's insolvency. What respondent has proved is that Aycock was insolvent seven or eight months afterwards, at the time the deficiencies were assessed against him in March 1934, and has continued so thereafter. It is true that the stipulation shows that the Commissioner has issued a warrant of distraint against Aycock and has found no property.

"This is equivalent to a return of an execution nulla bona against the debtor and is sufficient to prove that the creditor has exhausted his remedies against the debtor transferor (one of the neces-

say elements to prove in establishing transferee liability in equity), but the weight of authority seems to hold that the return of an execution nulla bona against the debtor, several months after the alleged fraudulent transfer, is not sufficient to prove that the debtor was insolvent at the time of the transfer or was rendered insolvent thereby. Cf. American Feature Film Co., 24 B.T.A. 18."

"In this latter case the facts showed that the taxes against the taxpayer transferor had not been paid and that distraint warrants had been issued against him and returned nulla bona. Nevertheless we said, 'These facts do **not prove insolvency immediately** after **the alleged distribution** (citing cases).

. . . . . .

"It should be kept in mind that in a transferee proceeding insolvency must be proved **at two basic dates: (1) at the time of the transfer of the property; (2) at the time the creditor brings his action to subject the property in the hands of the transferee to the payment of his claim**. The first is necessary in order to show that the conveyance was a fraud on the transferor's creditors. The second is necessary in order to show that the primary debtor is unable to respond to the creditor's demand and therefore a resort to a secondary liability is justified.

In **Wire Wheel Corporation of America v. Commissioner, 16 B.T.A. 737, 741—aff'd 46 Fed. (2d) 1013,** the court held:

"The Federal courts also require that the remedies against a transferor be exhausted to no avail before proceedings can be initiated against a transferee . See Swan Land & Cattle Co. v. Frank, 148 U.S. 603, which decision was cited in the report of the Senate Finance Committee (p. 29) on section 280 of the Revenue Act of 1926. In Pierce

v. United States, 255 U.S. 398, the court said:

> 'A judgment creditor's bill is in essence an equitable execution comparable to proceedings supplementary to execution. See Ex parte Boyd, 105 U.S. 647.
>
> . . . . . .
>
> It is true that the bill to reach and apply the assets distributed among the stockholders cannot, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and the execution thereon has been returned unsatisfied, Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371.'

"Thus it seems clear that were it not for section 280 the respondent could not have proceeded against petitioner in equity under the **trust fund** theory until he had exhausted available remedies against the Houk Company. It seems equally clear that he has not exhausted such remedies. . . . . .

. . . . . .

"Respecting this section we quote from the Senate Finance Committee's report, pp. 29 and 30.

> 'It is the purpose of the committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the act for the enforcement of tax deficienies. It is not proposed, however, to define or change existing liability. The section merely provides that if the liability of the transferee exists under other law then that liability is to be enforced according to "the new procedure applicable to tax deficiencies." '

"Manifestly this section was designed only to allow, and does only allow, the respondent an additional means of procedure against a transferee **only if available remedies against a transferor would be unavailing**. The same conditions precedent must be met in such a proceeding, however,

as must be met before an action in equity to enforce the same liability. No new liability is created and the act does not purport to provide for a proceeding against the transferee before action would otherwise lie against such transferee. On the record before us, it is apparent that the **respondent is attempting a short cut not contemplated by the statute.** Since there is no liability, judgment must be entered for the petitioner."

**Commissioner of Internal Revenue v. Oswego Falls Corporation, 71 Fed. (2d) 673 (2d Cir.):**

"The **remedy** afforded by section 280 of the Revenue Act of 1926 is **nonexistent until all the remedies against the taxpayer are exhausted.** Wire Wheel Corp. of America v. Com'r, 16 B.T.A. 737; Id. 46 F. (2d) 1013 (C.C.A. 2d). This section makes the executive processes available to determine and collect the liability of a transferee of property in respect of taxes incurred by his transferor, but it does not impose any new liability. Phillips v. Com'r, 283 U.S. 539.

. . . . . .

"Moreover, **no liability** arises to the taxpayers as transferee **until** the creditors' **rights** preserved to the Commissioner by section 11 of the Business Corporation Law have been **exhausted.** Wire Wheel Corp. of America v. Com'r, supra. The liability and corresponding right existing prior to the consolidation were expressly preserved and unimpaired by the statute. The **remedy** which the Commissioner has **chosen** is **conditioned** on the **exhaustion** of the **remedy he sets aside.** . . .

"The liability of a transferee, on the debt of his transferor, arises only upon exhaustion of remedies."

In **Terrace Corp. v. Commissioner, 37 B.T.A. 263,** the Board held that exhaustion of remedies against the

taxpayer is

> **"one of the necessary elements to prove in establishing transferee liability . . ."**

In **Gleichman v. Commissioner, 17 B.T.A. 147,** the Board held:

> "Before proceedings may be brought against a transferee the law requires that the **remedies** against the transferor **must have been exhausted** to no avail. Swan Land & Cattle Co. v. Frank, 148 U.S. 603, which decision was cited in the report of the **Senate Finance Committee** (p. 29) on section 280 of the Revenue Act of 1926. The Supreme Court said in Pierce v. United States, 255 U.S. 398:
>
> > 'It is true that the bill to reach and apply the assets distributed among the stockholders cannot, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and the **execution thereon** has been returned unsatisfied, Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371."
>
> "Except for **Section 280,** the respondent **could not have proceeded** against the petitioner **until he had exhausted available remedies** against the theatre company. We think he has not exhausted **such remedies.** The theatre company is, so far as the record shows, still in existence. A revenue agent testified that he examined the theatre company's books and investigated its ability to pay in 1924 and determined that there was nothing against which satisfaction could be obtained. The transferee liability was not asserted until May, 1926. There is nothing in the record to show the financial condition of the theatre company at that time.
>
> "Section 280 creates no new liability, but only allows the respondent an additional means of pro-

ceeding against a transferee when such transferee would be liable at law or in equity. The respondent has failed to establish any liability on the part of petitioner as a transferee of assets of the Broadway-Strand Theatre Co."

In **Annie Troll v. Commissioner, 33 B.T.A. 598, 602,** the Board held:

"Upon the foregoing facts, which we find, we are called upon to determine the liability of petitioner as transferee. The burden of proof is upon the respondent to show that petitioner is liable as a transferee. Title IX of the Revenue Act of 1924, as amended by section 602 of the Revenue Act of 1928. This burden includes the burden of showing that the transfer of the assets to the transferee rendered the transferor insolvent, or that the transferor was insolvent at the time of the transfer. (Cases) . . . In Florence McCall, supra, we stated in part:

'We have held that the statute places a **real burden** of proof on the respondent and that he must establish the liability of the transferee against whom he proposes to proceed. Eliza J. Wray, 24 B.T.A. 94; Annie Temoyan et al., 16 B.T.A. 923. . . . .

. . . . . .

"Richard Wunsch, deputy collector, testified that at the time he filed the notices of tax lien on July 2 and 3, 1930, he made efforts to locate some assets of Charles Troll, but that he was unsuccessful It is to be noted that the testimony of this witness is not directed toward proving what assets or liabilities Charles Troll had at the date in question, the controlling date, March 1, 1930, but to days more than four months later, and therefore, it is not sufficient to prove insolvency on March 1, 1930, the date of the transfers in question here. Even when considered as having some bearing up-

on the financial condition of Charles Troll at March 1, 1930, it is insufficient to establish that Charles Troll was insolvent at the date in question. He **did** not **testify** in detail **as to the efforts** he **made** to **locate assets** of the transferor and we cannot, in the exercise of our independent judgment, determine from his testimony that Charles Troll did not have other assets or was insolvent. **It is significant** that he **did not return any warant** of **distraint nulla bona** or make **any return whatsoever** upon any **warrant** of distraint in **the form provided thereon for the purpose** or in any other form. The form of return and accompanying instructions provided on each such warrant required a thorough search and a full report, in the form of a certificate, of the result over the signature of the deputy collector supported by his affidavit in the event of a 'report of no property found liable to distraint'. His **conduct is open to the inference that he was not in a position as a matter of fact to make such return.** For all we know from the evidence adduced, Charles Troll **may have** had **other assets** on March 1, 1930, of a value **sufficient** to cover **all of his liabilities.**

"It is also important to note that the space on the reverse side provided for the return of the deputy collector in each of the warrants for distraint against Charles Troll is wholly blank, there being no return made as to any of the warrants; and we are therefore not called upon to decide, and do not decide, whether such returns, if they had properly shown that no assets could be found, would have been favored with a presumption of correctness as to the financial condition of the transferor as of the date of the transfers or otherwise. . . . . .

"It may not be amiss to point out that in Hatch v. Morocco Holding Co., supra, (50 Fed. (2d) 138), the court stated:

'Ordinarily a creditor must proceed to judg-

ment against his debtor and have an execution returned nulla bona before he can pursue third persons on his claim (Citing cases.) * * * But, where the debt is admitted (citing cases), and it is apparent that a judgment and execution against the debtor would be futile (citing authority) the procedural requirement may be dispensed with.'

"Here it is not apparent that Charles Troll was insolvent and that it would have been futile to proceed against him; and we must hold that respondent has not met the burden of proof in this respect. . . . . "

In **Florence McCall v. Commisisoner, 26 B.T.A. 292,** it was said:

"We have held that the statute places real burden of proof on the respondent and that he must establish the liability of the transferee against whom he proposes to proceed."

. . . . . .

"It has been held that before proceedings may be brought against a transferee it must appear that the remedies against the transferor would be of no avail. Swan Land and Cattle Co. v. Frank, 148 U.S. 603; Phil Gleichman, 17 B.T.A. 1470. It does not appear in these proceedings that such is the case. It is our opinion that the contrary appears.

. . . . . .

"The respondent made no attempt between April 6, 1927 and January, 1930 to enforce either in law or in equity any liability against the estate of Mahlon or the executors thereof (W. Newton) although it is apparent from the facts that the fund hereinbefore referred to could have been reached by execution at and prior to the date of the attempted assertion of the transferee liability.

. . . . . .

"It follows from the foregoing that the petitioners herein are not liable as transferees."

In 26 R.C.L. 1185, Section 21, the law is stated as follows:

"**Conversion of Imperfect Gift into Trust.**—It is a well established rule that where an intended gift is incomplete or imperfect because of lack of delivery or other cause, and there is insufficient evidence to establish a trust, the courts will not, on account of such imperfection, convert the imperfect gift into a declaration of trust in order to effect the intention of the donor. . . . . There is no principle of equity which will perfect an imperfect gift, and a court of equity will not impute a trust where a trust was not in contemplation. And where an intention to give absolutely is evidenced by a writing which fails because of its non-delivery, the court will not and cannot give effect to an intended absolute gift by construing it to be a declaration of trust, and valid, therefore, without delivery. There is now **no distinction between the case of an intended gift from husband to wife, and that of a gift from him to a stranger,** though formerly in England when a gift by a husband to his wife was not permitted it was held that such a transaction could be supported as a trust."

**12 R.C.L. 951, Section 26:**

"**Imperfect Gift.**— . . . . Equity will not impute a trust where none was in contemplation, and an imperfect gift will not be given effect by construing it as a declaration of trust and therefore valid without delivery, even in case of a charity, though where a voluntary trust upon a meritorious consideration has been perfectly created, it may be enforced in equity."

In **Morsman vs. Commissioner, 90 Fed. (2d) 18 (8th Cir.)**, the Court held:

> "Trusts, Restatement, Section 26, Comment **a**, states the rule thus,
>
> "If a person declares his intention or promises that he will at a subsequent time transfer property then owned or thereafter to be acquired by him to another person in trust no trust arises unless and until he makes the transfer in trust.
>
> "Further, the declaration of an intent, unsupported by consideration, to hold and preserve one's own property for the eventual enjoyment of another is no more than a declaration of a purpose to make a gift, and in this case it is ineffective as such for lack of delivery. **Farmers Loan & Trust Co. v. Winthrop, supra**. The intent that the property was to be turned over to the trustee does not, therefore, amount to a declaration of trust because that intent had not been carried out at the time of the transactions under consideration. 'A declaration (of trust) implies an announcement of an act performed, not a mere intention. * * *'. **In re Brown's Will, supra.** To the same effect see Trusts, Restatement, Section 23."

In **Harvard vs. Commissioner, 26 B.T.A. 1161**, the Board held:

> "Upon the record it is perfectly clear that the petitioners surrendered their stock and received payment therefor in the checks of the taxpayer about June 1, 1924, in the amounts set forth in our findings of fact. **The record does not support a finding of fact that the taxpayer was liquidating its business at June 1, 1924.** The only corporate action relating in any way thereto was the resolution of the stockholders on December 31, 1924, authorizing the sale of the corporate assets, but that resolution is silent as to the disposition to be

made of the proceeds of such sale. The **certificates** for which the petitioners were paid were **not cancelled,** but were taken into the accounts of the taxpayer as treasury stock and later reissued to W. E. Corn. After the petitioners and several other stockholders had turned in their certificates and received payment therefor, the **taxpayer continued in the business of manufacturing ice and selling coal for more than a year.** The first corporate action looking to the closing out of the business was a resolution adopted on October 28, 1925, and the application for dissolution which was filed on June 28, 1926. Even then there is no statement to show whether the assets of the corporation had been distributed prior to the resolution authorizing dissolution or were to be distributed by the statutory trustees thereafter."

In **Ross v. Commissioner, 43 B.T.A. 1155,** the Board held:

"With respect to the argument advanced, it is necessary only to say that for the purpose of deciding this issue it matters not whether the respondent was of the view that the four individuals were the actual owners of the stock of the corporation in the proportions on which the profits were distributed, or whether he was of the view that the stock was owned 598 shares by Ross and one share each by Pershall and Hicks, as the stock account indicates, and that the 'considered' ownership of the stock by the four individuals was for the purpose only of computing the distributive share of the profits under a profit-sharing arrangement with Pershall, Jameson, and Hicks in return for the services which they were to render the corporation. **The controlling fact here is that the assets of the corporation after the transfer of its business and facilities to the partnership amounted to $60,000 and this amount was distributed to the stockholders of record, $59,800 being paid to**

**Ross and $100 each to Hicks and Pershall,** leaving the corporation without assets. These facts bring the petitioner W. R. Ross within the transferee provisions of the statute and **to the extent of such distribution he is liable as transferee."**

No. 10390

# In the United States Circuit Court of Appeals for the Ninth Circuit

AGNES C. JACOB, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SHIRLEY MAY JACOB, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

BEVERLY JEAN JACOB, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

GWENDOLYN E. JACOB, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS*

## BRIEF FOR THE RESPONDENT


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*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS*

## BRIEF FOR THE RESPONDENT

### OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 66–102), reported in 47 B. T. A. 381.

JURISDICTION

These petitions for review (R. 103–112, 224) involve transferee liability of the taxpayers for federal income and excess profits taxes of Central Holding Company for the fiscal year ended June 30, 1938. On April 8, 1941, the Commissioner of Internal Revenue mailed to Agnes C. Jacob, Shirley May Jacob, Beverly Jean Jacob and Gwendolyn E. Jacob notice of transferee liability in the amounts of $4,901.30, $5,105.52, $5,105.52 and $5,105,52, respectively. (R. 92.) Within ninety days thereafter and on July 2, 1941, each of the taxpayers filed a petition with the Board of Tax Appeals for a redetermination of the aforesaid liabilities under the provisions of Section 272 of the Internal Revenue Code. (R. 3–19.) The decision of the Board of Tax Appeals sustaining the deficiency was entered October 2, 1942. (R. 102–103.) These cases[1] are brought to this Court by petitions for review filed December 28, 1942 (R. 103–112, 224), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. As of October 22, 1942, by Section 504 of the Revenue Act of 1942, the name of the Board of Tax Appeals was changed to The Tax Court of the United States. Although the decisions of the Board were filed prior to that date, since the record was prepared subsequent thereto by the clerk of that tribunal he captioned the record "Upon Petitions to Review Decisions of the Tax Court of the United States."

[1] An order of this Court dated March 2, 1943, consolidated the proceedings "for trial" and printing a "single consolidated record." (R. 220–221.)

## QUESTIONS PRESENTED

1. The Board found that the taxpayers were owners of stock of a corporation which paid liquidating dividends to the taxpayers' agent who received the money for them. The payment of these dividends rendered the corporation insolvent. The corporation, which admittedly owes the taxes for which the taxpayers were assessed as transferees, was dissolved before they were assessed. Are these findings supported by substantial evidence? Are they sufficient to sustain transferee liability under Section 311 (a) (1) of the Revenue Act of 1936?

2. The Commissioner in 1939 refunded the income tax paid by the taxpayers on the liquidating dividends. In 1939, also, the Commissioner assessed Robert T. Jacob as transferee of the corporation on the ground of his receipt as his own of part of the same liquidating dividends for which these taxpayers were assessed as transferees. After appeal to the Board, a consent judgment was entered against Jacob. Does either the refund of the tax, or the assessment of Jacob estop the Commissioner or constitute an election? Is either *res judicata?*

## STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(f) *Further Deficiency Letters Restricted.*— If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Board within the time

prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subsection (e) of this section relating to assertion of greater deficiencies before the Board, or in section 273 (c), relating to the making of jeopardy assessments.

* * * * *

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title.

* * * * *

## STATEMENT

The facts as found by the Board of Tax Appeals, either in its findings of fact (R. 66–92) or its opinion (R. 92–102), may be summarized as follows:

The taxpayers are residents of Portland, Oregon. Agnes C. Jacob is the wife of Robert T. Jacob, and

the other three taxpayers are their daughters. From April, 1921, until 1926 Robert T. Jacob was employed in the office of the Collector of Internal Revenue at Portland, Oregon. Since he began his practice of law in 1926, he has devoted a considerable portion of his time to handling income tax matters, and holds himself out as an expert in federal income tax law. (R. 68–69.)

In 1936, and for a period thereafter, Jacob had an office-sharing arrangement with another attorney, James L. Conley. In June, 1936, E. W. Barnes, a client of Conley, held a contract for the purchase of a hotel property known as the Welcome Hotel, located in Burns, Oregon, about 330 miles from Portland. Under the contract Barnes could acquire the hotel property for $18,000, subject, however, to state, county and city taxes of approximately $22,000. Barnes was unable to finance the purchase of the property and at Conley's suggestion discussed the matter with Jacob who arranged for a loan of $15,000 from Farrell, a client of Jacob's. Central Holding Company (hereinafter referred to as the corporation) was organized under the laws of Oregon on June 20, 1936. Farrell made the agreed loan of $15,000, taking a mortgage on the property as security, and Conley and Barnes borrowed $3,000 from Jacob to be applied on the purchase price of the property. It was agreed that since Jacob had been instrumental in obtaining the $15,000 from Farrell, Conley and Barnes would contribute the $1,000 he was to pay under the original agreement. The $3,000 loan was subsequently repaid to Jacob. (R. 69–70.)

The corporation took title to the hotel property and began its operations on July 1, 1936. Barnes became president and manager of the hotel; Conley, vice-president, keeping the stock records and handling the corporation's legal affairs; and Jacob, secretary-treasurer, with duties of keeping the corporation's books of account, except those kept at Burns under Barnes' supervision, preparing the corporation's income tax returns and handling its tax matters. (R. 70.)

The corporation was organized with a capital stock consisting of 300 shares of non-par value common stock. A certificate for 100 shares of stock was issued to Jacob; certificates for one share, 26½ shares and 72½ shares were issued to Barnes; and certificates for 26½ shares and 73½ shares were issued to Conley. Since one of the conditions upon which Farrell made the loan of $15,000 was that the control of the corporation should be vested in Jacob until the loan was paid, Conley and Barnes endorsed their certificates for 26½ shares each, and delivered them to Jacob to be returned after Farrell had been paid. (R. 71.)

The corporation continued to operate the hotel until July 15, 1937, when the main building, together with all of its contents, was destroyed by fire. Only the boiler room with an apartment above remained. At the time of the fire the corporation carried fire insurance in a total amount of $72,000 on the building and furniture. (R. 71–72.)

Upon learning that the hotel was burning, Conley advised Jacob and they discussed the probable future course of the corporation in the event of a complete

destruction of the hotel by fire. Jacob expressed his desire to discontinue his connection with the corporation. Conley went to Burns, Oregon, and Barnes asked him what he and Jacob thought of rebuilding. Conley stated that Jacob wanted "to take his money and get out," but that he, Conley, would join in rebuilding if they could do so without going very heavily into debt. Barnes asked that Jacob and Conley give him their stock in the event that they did not desire to continue. Conley replied that he was agreeable, and when advised of Barnes' request, Jacob also assented. Barnes regarded the corporation as a nuisance but desired to continue its existence because of his belief that corporate financing would be easier than personal financing. (R. 72.)

After Conley's return from Burns, Barnes came to Portland. Barnes wanted to rebuild but Conley and Jacob advised him that they had decided against participation. As a consequence, it was decided to distribute the corporation's assets. Conley and Jacob agreed that they would give their stock in the corporation to Barnes for whatever use he might care to make of the corporation. At the time of the fire the corporation had reduced the state, county and city taxes from $22,000 to approximately $16,000 and the loan from Farrell had also been greatly reduced. (R. 73.)

By August 12, 1937, proceeds of three insurance policies totaling $18,000 had been collected and all debts or liabilities of the corporation, exclusive of taxes, had been paid, including the balance due Farrell. Farrell had been paid either from the insurance proceeds or

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from a bank loan. A balance of $7,266.32 remained and it was decided that this should be distributed to the stockholders. Since both Barnes and Jacob had received cash in excess of the amount allocable to their stock, payments were made by them to Conley in amounts sufficient to equalize the three parts at $2,422.10. This was accomplished at a meeting of the three on August 12, 1937, at which time each of them signed a receipt to the corporation showing that $2,-422.10, one-third of the above net proceeds of insurance, had been received. The receipts signed by Conley and Barnes were signed, "Jas. L. Conley," and "E. W. Barnes," respectively, while the receipt signed by Jacob was as follows: "R. T. Jacob for Agnes C. Jacob, Gwen Jacob, Shirley Jacob, Beverly Jacob." (R. 73–74.)

A few days later $54,000, due under another insurance policy, was received, and on August 17, 1937, Barnes, Conley, and Jacob met at the First National Bank in Portland and divided the sum, each receiving $18,000. After this distribution the corporation was left with no property or assets except the property upon which the hotel at Burns had stood. The value of that property was not in excess of $10,000, while state, county and city taxes were outstanding against it to the extent of $16,000 or $17,000. The property was later lost to the county in delinquent tax proceedings. As a result of the distribution of the insurance proceeds, the corporation was rendered insolvent and unable to pay its debts. (R. 74.)

At or about the time the corporation was organized, Jacob showed a picture of the hotel to his wife, Agnes

C. Jacob, and his daughters, the taxpayers herein, and told them he was going to give each of them a portion of the stock received by him in the corporation. Shortly after he reiterated that promise and took his wife to Burns to see the hotel, where they stayed for several days. Jacob's reason for having the stock issued to him in his name was that he had promised Farrell that he would retain control of the corporation until Farrell had been repaid. The 100 shares issued in Jacob's name, plus the 26½ shares each issued in the names of Barnes and Conley, and endorsed and delivered to Jacob, constituted 51% of the corporation's outstanding stock. As soon as the Farrell loan was paid, in July, 1937, Jacob returned to Barnes and Conley the certificates received from them, and shortly thereafter he had the 100 shares of stock, standing in his name, reissued in five certificates—one share to himself, 24 to his wife, and 25 each to his three daughters. At the time the certificates were issued, his wife and daughters were at Seaside, Oregon. (R. 199.) He mailed the certificates to his wife requesting that they be endorsed and returned to him. She knew that the certificates received were related to the "Welcome Hotel" and were the shares of stock that Jacob had promised to give to her and his daughters. The shares were endorsed and returned to Jacob within a few days. At no time after the issuance of the 100 shares in his name did Jacob consider that he was the beneficial owner thereof, but at all times considered that his wife and daughters were the beneficial owners. At the time the fire insurance proceeds were distributed by the corporation, the Jacob stock was

owned one share by Jacob, 24 shares by his wife, and 25 shares by the three daughters. (R. 75–76.)

Although the name Central Holding Company did not impress itself upon the minds of the taxpayers, they were familiar with the subject matter of the gift and knew that it represented an interest in the Welcome Hotel at Burns. The taxpayers had confidence in and trusted Jacob and believed that he would look after their interest. They had no business experience and anything affecting their business affairs was left entirely to Jacob, the husband and father. (R. 97.)

Jacob retained the certificates endorsed by the taxpayers until final distribution of the insurance proceeds on August 17, 1937, whereupon they were given by him to Barnes. At about the same time, Conley gave his certificates to Barnes and he and Jacob submitted their resignations as directors and officers of the corporation. (R. 76.)

In 1937, Jacob, for these taxpayers, and without consideration, received from the corporation the following amounts, leaving it insolvent and unable to pay its taxes: Agnes C. Jacob, $4,901.30; Shirley Jacob, $5,105.52; Beverly Jacob, $5,105.52; Gwendolyn Jacob, $5,105.52. (R. 92.)

Shortly after the burning of the hotel at Burns, Barnes acquired six lots in Hines, Oregon, on which stood a partially constructed building known as the Hines Hotel. Barnes received title to the property in his own name by two deeds, one dated August 4, 1937, from the the county which had acquired the property for nonpayment of taxes, and the other a

quitclaim deed dated July 24, 1937, from a former owner of the property. Barnes conveyed the property to his wife, Olive G. Barnes, by quitclaim deed dated August 4, 1937. The money used by Barnes in making the purchase was part of the $3,000 received by him in the first distribution of insurance proceeds by the corporation. On November 29, 1937, Barnes and his wife conveyed the Hines Hotel property to the Central corporation and about the same time he negotiated the purchase of a hotel in Arlington, Oregon. The purchase price, stated at $50,000, was to be paid by a purchase money mortgage for $24,000, the assumption of accrued taxes of about $5,000, the conveyance of the Hines Hotel and some additional lots at $15,000 (an amount largely in excess of their value), and the remainder in cash which was paid by Barnes out of a portion of the insurance proceeds received by him from the corporation on August 17, 1937. Although title to the Arlington property was taken in the name of the corporation by a deed dated December 15, 1937, Barnes had requested Conley, his attorney in the transaction, to have the property transferred to him before the end of 1937. Conley did not carry out the instructions until September, 1938, when the property was conveyed to Barnes or his wife or both. (R. 76–78.)

The corporation was dissolved on January 6, 1941, by proclamation of the Governor of Oregon and its articles of incorporation revoked for failure, for two consecutive years preceding, to file the statements or pay the license fees required by law. (R. 78.)

Jacob prepared income tax returns for each of his

three daughters for the calendar year 1937 showing a net income of $3,958.43, resulting from a sale or exchange in August, 1937, of 25 shares of stock of the corporation acquired in June, 1936. Only 80% of the gain was shown as taxable on the ground that the stock had been held for more than one year, but not over two years. A similar return was filed for Mrs. Jacob, reporting gain on the sale or exchange of 24 shares of stock of the corporation. Jacob's return showed a net income of $23,048.11, including an amount of $15,833.75 as gain resulting from the sale or exchange on August 8, 1937, of 100 shares of stock in the corporation acquired on June 22, 1936. (R. 78–79.)

Attached to Jacob's return was a statement stating that filed concurrently with that return, which included all the profit from the disposition of the stock of the corporation, were separate returns for his wife and three daughters, in each of which was also included proportionate amounts of the same profits. The statement said that it was obvious that the profit is not taxable upon both theories, but due to the many questions presented in connection with gifts, the circumstances require the returning of the income in the several returns. It was stated also that gift tax returns for the year, 1937, were also required by the circumstances, although the gifts "were in fact purported to have been made in 1936." The statement continued that it was his original purpose to make a division of the shares at the time of the incorporation, but the plan was frustrated by conditions imposed by Mr. Farrell. (R. 79–80.) Notwithstanding

the exactions of Mr. Farrell, the statement continued that Jacob informed the members "of my family, that I was giving them shares of the corporation's stock." The statement continued (R. 81):

> While this promise was made, it should be pointed out that the stock was in fact neither issued nor delivered to the donees until the latter part of July or the early part of August, 1936, at about the time the mortgage to Mr. Farrell was paid. In this connection, it should also be pointed out that while the certificates were issued and delivered at this time, they were dated as of the date of the original date of incorporation. However, stamps covering two transactions, one from myself to the members of my family and from them to Barnes, were affixed to photostatic copies of said certificates retained by me.

On April 20, 1938, Jacob filed a gift tax return with the Collector of Internal Revenue, showing no tax liability. In this return he reported the gift to Mrs. Jacob of 24 shares of stock of the corporation, and showed love and affection as his motive, and reported the gift to each of his daughters of 25 shares of stock, showing "College Educations" as his motive for making those gifts. An affidavit attached to that return stated, among other things, that it was Jacob's belief that the gifts were in fact made in 1936, but due to the fact that the stock was purchased in that year at a nominal consideration, its value was not sufficient to require the filing of a return in that year, but that should he be mistaken in his position that his gift was not in fact consummated until 1937, then the returns

filed with the statement are required. On the same day information returns of gifts, prepared by Jacob for the taxpayers of this case, was filed reporting the gifts to them of the stock in the corporation in 1937. (R. 82–83.)

The revenue agent, investigating the 1937 income tax returns of Jacob and the taxpayers herein in December, 1938, concluded in his reports that the gain on the stock in the corporation was taxable to Jacob, and that Mrs. Jacob and daughters received gifts of the proceeds from the liquidation of the corporation rather than gifts of the stock. Accordingly, he found that the daughters had no tax liability for 1937, and that Mrs. Jacob was entitled to a refund based upon the elimination from her income of the gain on the corporation's stock. The refunds thus recommended, were made by the Commissioner in 1939. (R. 83.)

The corporation adopted a fiscal year ended June 30 upon its organization. Jacob prepared, and Barnes signed and filed, the return for the fiscal year ended June 30, 1937, on September 15 of that year. The return showed net income of $3,681.90 and tax liability of $578.59. Upon audit of this return, the Commissioner determined that the correct net income for the year was $17,768.01 and that there was a deficiency in tax of $5,312.50, and that the corporation was liable for a 50% fraud penalty of the amount of $2,656.25. Barnes had an income tax return prepared for the corporation and filed it with the Collector on September 15, 1938. The return showed a net income of $29,-950.20 as gain resulting from the fire, and a tax liability of $6,007.82. As a result of the audit of the 1938

return, the Commissioner determined that the correct net income was $41,328.53 and that there was a deficiency in tax of $2,974.36. On March 17, 1939, he sent a notice to the corporation advising it of his determination of the above deficiency, whereupon the corporation filed a petition with the Board of Tax Appeals for redetermination of the deficiencies for both years. On March 17, 1939, also, the Commissioner sent notices to Jacob, Conley, Barnes and his wife, advising them of his determination of the above deficiencies and penalties and that he proposed to assess such deficiencies and penalties against them as transferees. Jacob, Conley, Barnes and his wife thereafter filed petitions with the Board alleging error in the Commissioner's determination. (R. 83–84.)

In Jacob's petition, filed June 10, 1939, duly verified before a notary public on June 8, 1939, he stated that prior to the issuance of any shares of stock in the corporation, he had promised to make a gift of the shares to his wife and daughters, that pursuant to the requirements of Farrell, he continued to hold the 100 shares of stock until the loan was repaid, that shortly after the fire, but before repayment of the Farrell loan, he (Jacob), acting on behalf of the taxpayers in this case, entered into an agreement with Barnes whereby the latter agreed to purchase 100 shares of stock which Jacob was holding in trust for the taxpayers for an amount equal to the value thereof as determined by an accounting. That after the payment of the Farrell loan, and in pursuance of his agreement to give stock to taxpayers, he surrendered the certificates for 100 shares of stock in the corporation and

caused to be executed and delivered in lieu thereof a certificate for one share to himself, a certificate for 24 shares to the taxpayer, Mrs. Jacob, and certificates for 25 shares to each of the other three taxpayers, and that at the time of the payment of the $18,000, he delivered to Barnes the above mentioned certificates of stock which had been issued to himself and the taxpayers, all of which had been endorsed by the respective owners thereof. The Commissioner in his answer denied the foregoing allegations and affirmatively alleged that at the time of the distribution on August 17, 1937, Jacob was a stockholder in the corporation and that as such stockholder, there was distributed to him on that date, without consideration, cash in the amount of $20,422.10. (R. 85–86.)

The above proceedings came on for hearing before the Board of Tax Appeals on November 29, 1939, at Portland, Oregon. On November 30, 1939, after the introduction of certain evidence respecting the issue of fraud in the case of the corporation, but before the production of evidence as to transferee liability of the other parties, counsel for the corporation, Conley, Barnes and Mrs. Barnes, stated that as a result of conversations between counsel, and while the petitioners in the case did not wish to admit the fraud penalty that for the purpose of closing the case, it was agreed that the Board could enter its decision that there was a deficiency in income tax for the year ended June 30, 1937, in the amount of $2,528.72 and of excess profits of $881.62, and 50% penalties in the amounts of $1,264.36 and $440.81 on the income and excess profits tax, respectively. It was also stipulated that

there was a deficiency for the fiscal year ended June 30, 1938, in the sum of $1,875.48 in income taxes and of $1,098.88 in excess profits taxes. (R. 86–87.) Counsel for Jacob stated that Jacob agreed to the stipulation but denied the amount of the deficiency and the liability for the fraud penalty of the transferor, but admitted that he was a transferee. Pursuant to the stipulation, the Board, on December 5, 1939, entered its decision determining deficiencies and penalties against the corporation and transferee liability against Jacob, Conley, Barnes and Mrs. Barnes. (R. 88–89.)

The tax liability of $6,007.82, shown on the corporation's return for the fiscal year ended June 30, 1938, was assessed on October 13, 1938, but no part of it has ever been paid. Notice and demand for the tax was issued by the Collector on October 6, 1938, and a second notice and demand was issued on October 18, 1938. On November 9, 1938, a warrant for distraint was issued and on March 7, 1939, lien was filed with the Clerk of the United States District Court at Portland and with the county clerks of Multnomah County (Portland), Harney County (Burns), and Gilliam County (Condon). Efforts of the Collector to collect the tax have been fruitless. (R. 89.)

On March 1, 1940, the Commissioner filed with the Board in each of the cases of Jacob, Conley, Barnes and Mrs. Barnes, a motion to vacate the decision entered on December 5, 1939, in order that the transferee liability might be increased in an amount equal to the unpaid portion of the original tax shown on the returns of the corporation for the fiscal years involved, plus the amounts shown in the Board's deci-

sions entered on December 5, 1939, which imposed transferee liability only for the amount of the deficiencies assessed by the Commissioner for those tax years. The motions stated that the Commissioner was unaware of the fact that the original taxes had not been paid when the stipulation respecting the transferee liability was entered into, but that fact was known to the parties. On March 4, 1940, the Board vacated its decisions entered on December 5, 1939, and ordered the parties to file briefs in connection with the Commissioner's motion. In addition to filing a brief, Jacob filed an affidavit admitting, at the time of the negotiation of the compromise stipulation of settlement that he and his counsel knew that a portion of the tax shown on the corporation's return for the year ended June 30, 1937, and all of the tax shown on the return for the year ended June 30, 1938, had not been paid, and stated that no inquiry was made by counsel for the Commissioner as to whether such taxes had been paid, and that he assumed counsel for the Commissioner had knowledge of such fact. On April 9, 1940, the Board denied the Commissioner's motions and on April 10, 1940, entered its decisions holding that Jacob, Conley, Barnes and Mrs. Barnes each was liable as transferee of assets of the corporation only for the deficiencies determined in the decision entered in the case of the corporation on December 5, 1939, together with interest as provided by law, which was apparently inadvertently omitted from the decision of that date. Jacob has paid his total liability as transferee as thus determined by the Board. (R. 89–92.)

On April 8, 1941, the Commissioner sent notices to the taxpayers herein, advising them of his proposal to assess against them as transferees of the corporation the amounts involved herein with respect to the unpaid income and excess profits taxes of the corporation for the year ended June 30, 1938. (R. 92.) The Board of Tax Appeals sustained the Commissioner in assessing these taxpayers as transferees. (R. 102–103.)

## SUMMARY OF ARGUMENT

### I

The Board found that the corporation, the unpaid taxes of which gave rise to the transferee liability here involved, paid liquidating dividends on stock owned by the taxpayers which rendered it insolvent. The dividends were received by the taxpayers' agent for them. The corporation was dissolved before the taxpayers were assessed as transferees. Each of these findings are supported by substantial evidence and are accordingly conclusive here. Together they constitute all the elements necessary to sustain transferee liability.

The receipt of money by an agent under familiar rules is receipt by the principal. Transferee liability is personal, but even were it *in rem*, receipt by an agent is sufficient to impose liability against the principals.

The element of transferee liability that the Commissioner must exhaust his remedies against the transferor, is founded on the fact that transferee liability ought not to be imposed until it is shown that the

transferor is unable to satisfy its obligation. It has no application, therefore, where as here the transferor was dissolved before transferee liability was imposed and it was shown that it was insolvent for several years before dissolution. Clearly an idle gesture is not required.

II

Neither the act of the Commissioner in refunding income taxes paid by the taxpayers on the liquidating dividends of the corporation nor the assessment of Robert T. Jacob, as transferee of the corporation, on the theory that he was the owner of the liquidating dividends, the Board here found were in fact owned by the taxpayers, constituted an estoppel or an election. Nor is the refund of the Commissioner or the consent judgment entered against Jacob *res judicata.*

To establish equitable estoppel reliance with detriment upon the alleged activity which estops must be proved. Here it was neither alleged nor proved. Nor could it be since the refund was a tax benefit and the payment of the judgment by Jacob was a *pro tanto* reduction of the transferee liability of the taxpayers.

There must be a judgment of a court of competent jurisdiction before *res judicata* can be successfully invoked. It is plain that the Commissioner's refund is not a judgment by a court. Nor was the consent judgment of the Board *res judicata* for the reasons that neither the same parties nor their privies were involved, and it has been said that a judgment entered on stipulation cannot be *res judicata.*

Finally the Commissioner is not barred by election.

The doctrine is that where the Commissioner has two equal rights against a taxpayer, but he cannot have both, he is bound by the one he chooses. If there were two equal rights with respect to taxing the dividends it is clear that in refunding taxpayers' personal income tax the Commissioner chose to exercise the right which he had against them as transferees. His action in assessing Jacob as a transferee was not an election because he did not have an equal right to proceed against Jacob and the taxpayers as owners of the same fund. It has been correctly held that an erroneous determination of the Commissioner against another not only does not bar the Commissioner, but would not excuse the Board for failure to sustain the Commissioner's position.

ARGUMENT

Central Holding Company (hereinafter referred to as the corporation) filed an income and excess profits tax return for the fiscal year ended June 30, 1938, showing a tax due of $6,007.82. (R. 156.) The liability of the corporation for this tax has not been contested by the taxpayers [2] herein. The Commissioner notified the taxpayers by separate letters dated April 28, 1941, that there would be assessed against them stockholder-transferee liability of the corporation for its unpaid income and excess profits taxes for the fiscal year ended June, 1938, plus interest. (R. 19–20.) On March 17, 1939, the Commissioner had as-

[2] The petitioners will, for convenience, be referred to as "taxpayers" although their status as such arises because of the transferee liability assessed against them rather than any controversy about income or other taxes arising from their earnings.

sessed a deficiency for income and excess profits taxes and a fraud penalty against the corporation for the fiscal year ended June 30, 1937, and a deficiency for income and excess profits taxes for the fiscal year ended June 30, 1938. On the same day the Commissioner sent notices to J. L. Conley, E. W. Barnes and his wife and R. T. Jacob advising them that he proposed to assess the deficiencies and penalties of the corporation against them as transferees. (R. 84.) After petitions to the Board, a judgment for transferee liability was entered on stipulation. Those transferees were never assessed for the tax shown on the face of the corporation's return for the fiscal year ended June, 1938, and the Board refused to enter a judgment against them for the tax shown on the return. (R. 84–92.) It is that unpaid tax of the corporation plus interest for which these taxpayers were assessed as transferees.

Section 311 (a) (1) of the Revenue Act of 1936, *supra,* permits the assessment and collection of an amount from a transferee equal to his liability at law or in equity for a tax imposed on the transferor. That section provides that the liability shall be "assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title." This provision has reference to Section 272 of the Revenue Act of 1936.

Taxpayers' counsel argues from provisions of Section 272 (f), *supra* (Br. 6–10), that the Commissioner is precluded here because he has already assessed a

deficiency for transferee liability against others for the unpaid taxes of the corporation for the fiscal year ended June 30, 1938. Section 272 (f) provides in essence that after a deficiency has been assessed and the taxpayer files a petition with the Board "the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year."

Counsel's contention is without merit for at least three reasons. 1. This case does not arise because of a *deficiency* asserted by the Commissioner. The Commissioner asserted *transferee liability* against the taxpayers—not a deficiency. (R. 19–20.) There has been only one deficiency determined in connection with the fiscal year ended June, 1938, taxes of the corporation and that was done by letter dated March 17, 1939, addressed to the corporation. (R. 84.) The notices the Commissioner sent to Conley, Jacob and Barnes, *supra,* were not notices of additional deficiencies, but rather notices of their liability as transferees for the original deficiency of the corporation. And the notices which gave rise to this litigation similarly were not notices of additional deficiencies, but rather notices of imposition of transferee liability for the unpaid tax of the corporation shown on its return. Thus this proceeding is not concerned with a second deficiency asserted against either the corporation or these taxpayers. 2. Moreover, the provision merely prohibits a determination of an additional deficiency against a taxpayer after a petition has been filed with the Board. Thus, even had the Commissioner assessed a deficiency

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against these taxpayers, there have been no prior deficiencies assessed against each taxpayer here, the situation to which Section 272 (f) refers. That transferees are to be treated as taxpayers is made unmistakably clear by the Conference Report accompanying the Revenue Act of 1926, where the transferee provision first was inserted in the Revenue Laws. The Report stated "* * * for procedural purposes the transferee is treated as a taxpayer should be treated." H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 44 (1939–1 Cum. Bull. (Part 2) 371). The courts have so referred to transferees. See *Phillips* v. *Commissioner,* 42 F. 2d 177 (C. C. A. 2d), affirmed 283 U. S. 589; *United States* v. *Updike,* 281 U. S. 489; *Routzahn* v. *Tyroler,* 36 F. 2d 208 (C. C. A. 6th). It is manifest that there has been no prior deficiency assessed against any of these taxpayers. 3. Finally, the contention of counsel would preclude the Commissioner from following more than one transferee. This result would emasculate the effectiveness of the transferee remedy for if the Commissioner first assessed a transferee against whom satisfaction of the judgment after decision by the Board proved impossible, he would be precluded from proceeding against others. That the Commissioner is free to go against all transferees until satisfaction of the transferor's liability was the underlying assumption of *Phillips-Jones Corp.* v. *Parmley,* 302 U. S. 232. See *Peir* v. *Commissioner,* 96 F. 2d 642, 648–649 (C. C. A. 9th).

## I

**The Board's findings of fact are supported by substantial evidence and constitute all of the essential elements of transferee liability**

Congress, in enacting Section 311 (a) (1) of the Revenue Act of 1936, merely provided another method of determining common law transferee liability. Whether liability exists, however, is ascertained by reference to "the liability, at law or in equity." The components of transferee liability other than that imposed by contract are now well established.[3] It is stated in 9 Mertens, Law of Federal Income Taxation 499 that "these elements are, it will be noted, principally factual; and one thought must be kept in mind * * * transferee liability can be applied only with reference to the particular facts of the case before it * * *.

Thus although there are legal questions to be resolved, these appeals largely involve questions of fact. The taxpayers' brief is predominantly built on a selected and, we believe, distorted view of the facts and the inferences which they draw therefrom. It is

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[3] They are listed in 9 Mertens, Law of Federal Income Taxation 495–499, as follows: (1) The transfer must have been made after the original tax had accrued; (2) the transferor must have been liable; (3) all reasonable efforts must have been made to collect the tax from the original taxpayer, but useless steps will not be required; (4) there must have been a transfer of assets having value to the transferee; (5) the transfer must have left the transferor insolvent and (6) the statute of limitations must not have run. The taxpayers here raise no question concerning the satisfaction of elements 1, 2, and 6.

hardly necessary, however, to remind this Court that "it is the function of the Board, not the Circuit Court of Appeals, to weigh the evidence, to draw inferences from the facts and to choose between conflicting inferences." *Wilmington Trust Co.* v. *Commissioner,* 316 U. S. 164, 168. The taxpayers come here with a heavy burden in view of the limited scope of review on questions of fact for, if the findings below are supported by substantial evidence, they are conclusive here. Nor is this underlying principle of the relationship between the Circuit Courts of Appeals and the Board of Tax Appeals mitigated by the proposition advanced by taxpayers' counsel in specification of error IX (Br. 6, 10–12), that the statute imposes the burden of proof upon the Commissioner to establish every element essential to transferee liability. The burden of proof imposed upon the respondent is merely that of establishing a prima facie case and once sufficient evidence is put in to do so the burden is on the taxpayers to rebut it or suffer a finding against them. *Hutton* v. *Commissioner,* 21 B. T. A. 101, 103, affirmed, 59 F. 2d 66 (C. C. A. 9th). It goes without saying that if there is substantial evidence to support the essential findings, the least that can be said is that a prima facie case has been made.

The prolonged effort of taxpayers' counsel to direct attention to isolated statements often contradicted or impeached and to draw unrestrained inference upon inference constitutes, when viewed most charitably, an astonishing attempt to retry these cases in an appellate court.

**A. The stock upon which transferee liability is here predicated was owned by the taxpayer**

Ownership is, of course, a mixed question of law and fact. But the legal principles concerning the elements of a gift *inter vivos* are not in dispute; we have no quarrel with the Oregon gift cases counsel cites. Intention and delivery are the two requisites. There is substantial, and in fact, uncontradicted evidence to support the Board of Tax Appeals' finding of the existence of both. The Board stated that the necessary facts were proved by the taxpayer's witness, Jacob "and regardless of any evidence that respondent may have offered". (R. 96.) Jacob testified that when the corporation was organized he promised to give its stock to members of his family and so informed them (R. 182); a certificate for 100 shares was issued to him rather than his family because Robert S. Farrell imposed as a condition of lending $15,000 to the corporation the retention of its control by Jacob (R. 182); after the hotel burned, a certificate of one share in Jacob's name, 25 in Mrs. Jacob's and 25 each in the name of his daughters was prepared, signed by the corporation's president and sent by Jacob to his wife and daughters who endorsed them (R. 183–184); he always considered them the beneficial owners (R. 186). This testimony of the taxpayer's witness concerning his intention to give the stock and the actual delivery of the certificates is confirmed by documentary evidence.[4]

[4] In Commissioner's Exhibit DD (R. 195–201) (Jacob's statement under oath to a revenue agent). Jacob reviewed the circumstances concerning his intention to give the stock and the reason for not immediately doing so. He continued, "Immediately upon

Notwithstanding this and other similarly uncontradicted evidence, counsel asserts that the stock was not owned by these taxpayers. (Br. 11, 15, 17.) He admits certificates in the name of the taxpayers were made out but asserts they were not signed. (Br. 15.) This is contradicted by Commissioner's Exhibits C (R. 120–121), F (R. 122–123) and I (R. 126) all of which show the signature of E. W. Barnes, president, and Robert T. Jacob, secretary. All of them were endorsed in blank by the respective owners. It is contradicted further by Jacob's testimony. (R. 184.) We known of no statement in the record to the contrary.

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the * * * satisfaction of the obligation imposed by the said Farrell, I caused certificates of stock to be issued to the members of my family. They were at the time in Seaside, Oregon, and the certificates after issue were forwarded to them at that place." (R. 199.) Included in the affidavit is the contents of a letter written by Jacob to Barnes on August 17, 1937, in which he states, "Inasmuch as you have acquired the stock of the undersigned, Mrs. Jacob, and the girls, I have no further interest in the Central Holding Company * * *" (R. 200.) In Commissioner's Exhibit EE, also an affidavit, Jacob speaks of his family selling the stock. (R. 209.) Commissioner's Exhibits C, F and I are stock certificates for 25 shares in the name of Beverly Jacob; Shirley Jacob and Gwendolyn Jacob, respectively. (R. 120, 122, 126.) Jacob in his petition under oath to the Board in the transferee case against him of which the Board properly took judicial notice (R. 85) confirmed the above, stating in part "that after the payment of the Farrell loan and in pursuance of his agreement to give stock to Mrs. Jacob and the daughters, he (Jacob) surrendered the certificate for 100 shares of stock in Central and *caused to be executed and delivered* in lieu thereof a certificate for one share to himself, *a certificate for 24 shares to Mrs. Jacob, and certificates for 25 shares to each of the daughters* * * * that at the time of payment of the $18,000 he delivered to Barnes the above mentioned certificates of stock which had been issued to himself, Mrs. Jacob, and the daughters, all of which had been endorsed by the respective *owners* thereof." [Italics supplied.]

Jacob testified (R. 185):

> My reason for not giving my family the money as I intended to give them an interest in a going concern in the form of stock. The question of making them gifts of cash was not within my purpose, and I felt that would be unwise.

Counsel concludes from the above statement that "he [Jacob] intended them to have the stock, but he abandoned that purpose because of the changed conditions". (Br. 17.) Two observations are compelled. (1) If a gift of stock had been made a lack of intention to make a gift of cash received as a dividend on the stock is irrelevant. (2) Jacob clearly did not say, contrary to counsel's assertion, that (a) Jacob did not give the stock or (b) that he ever abandoned an intention to give it. His statement about not intending to give cash is clearly not responsive to the question of whether a stock gift has been made.

**B. Receipt by Jacob, as agent for the taxpayers, of the liquidating dividends of the corporation paid on the stock owned by the taxpayers, was receipt by them**

1. There can be no question on this record that the Board's finding that the money received by Jacob in two installments was a liquidating dividend of the corporation is supported by substantial evidence. The Board found [5] that (R. 94, 96)—

> * * * Jacob, whether acting for himself or for the petitioners, with Conley decided not to

[5] It is well settled that facts contained in the Board's "opinion" are entitled to the same weight as those in its findings proper. *California Barrel Co.* v. *Commissioner*, 81 F. 2d 190 (C. C. A. 9th); *Insurance & Title Guarantee Co.* v. *Commissioner*, 36 F. 2d 842, 845 (C. C. A. 2d), certiorari denied, 281 U. S. 748.

> continue in the hotel business with Central or otherwise. They could see a most attractive cash profit as the result of the fire and decided to take it out. From the insurance proceeds they paid the debt to Farrell and certain other obligations of Central and then distributed the balance in three parts to the stockholders, leaving Central in an insolvent condition. Barnes had no intention or thought of buying either the Conley or Jacobs [sic] stock. There was simply a division of the available assets, which in this case happened to be cash. Barnes had some idea that if he might control the corporate shell it might be of some use to him in financing the acquisition of another hotel through the use of a portion or all of the money he had received from Central, but it is perfectly plain that he had no intention that Central should own or conduct any hotel business subsequently acquired by him. * * * Barnes took down a pro rata part of the net insurance proceeds just as Conley and Jacob did. On the evidence we think it perfectly clear that the net insurance proceeds were distributed to or for the Central stockholders and no part thereof may be regarded as having been paid for the Jacob or Conley stock by Barnes.

Counsel's elaborate argument to the effect that Jacob sold the taxpayers' stock (Br. 40–56) is without factual support except in the impeached and contradicted testimony of Jacob.

Barnes testified that there were two distributions of the insurance proceeds (R. 156); that Barnes asked Conley and Jacob to give him their stock and they agreed (R. 157); that after the insurance proceeds

were distributed, the corporation had no assets except land and the ruined buildings with a fair market value of between $4,000 and $5,000 against which there were unpaid state, county and city taxes of $16,000 (R. 157); the money used to acquire property subsequently taken in the name of the corporation was Barnes' money; he took title in the corporation because of advice given by Jacob that it would save $3,000 in taxes and because Barnes thought corporate financing would be more easily arranged than personal (R. 158–159); Barnes "never purchased any shares from Jacob and he never sold me any" (R. 159); "at the time Jacob turned over the stock certificates to me, I did not pay or promise to pay him anything for them" (R. 159); the $20,400 received by Barnes from the corporation he treated as his own (R. 163); he did not treat it as corporate money, but used the corporation as a name only (R. 164, 168).[6]

James T. Conley, one of the three original stockholders of the corporation, testified that the corporation had left out of the insurance money after paying all bills "about $61,000" which was "divided three ways, $20,422.10 to each of the three stockholders." (R. 128.) Commissioner's Exhibit K consists of three separate receipts dated August 12, 1927. In each,

[6] This testimony is confirmed in part by Petitioner's Exhibit 5, a letter dated January 24, 1928, written by Barnes to Jacob in which he stated: "* * * and if there is any tax to be paid on the $40,000.00 that you and Conley took out of the Company, you sure will have to pay it." (R. 166–167.) Barnes testified that "the $40,000 referred to in the letter must have been the $20,000-odd that Jacob [illegible] received and the $20,000-odd that Conley received." (R. 168.)

receipt was respectively acknowledged from Central Holding Company of $2,422.10, "being one-third net proceeds of insurance on hand this date" by James T. Conley, E. W. Barnes and R. T. Jacob for the taxpayers. (R. 129–130.) Conley testified further that long after the surrender of Jacob's certificates he heard the transaction referred to as a sale, but never prior to August 18, 1937; that everybody knew that he [Conley] was giving his stock to Barnes and that Barnes paid no consideration for the stock; that all he knew about the Barnes and Jacob "deal" was that Jacob had told him that Jacob was giving his stock to Barnes and that he saw Jacob give his stock to Barnes; that if there was any consideration he didn't know about it (R. 134); that Jacob, when asked if he would give his stock to Barnes stated he would; Barnes looked on the corporation more or less as a nuisance.

In view of this consistent documentary evidence and testimony of Conley and Barnes, counsel's insistence on overturning the Board's finding is astonishing. It is based solely on the testimony of Jacob, an impeached witness (R. 189–192), which is contradicted at every point by the documentary evidence and the testimony of Barnes and Conley.

2. It has been established, *supra,* that liquidating dividends were received by Jacob on stock owned by these taxpayers. There can be no question that receipt by an agent is receipt by the principal. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 347; *Helvering* v. *Schaupp,* 71 F. 2d 736, 737 (C. C. A.

8th). Counsel claims, however, that Jacob was not an agent and even if he were he received the money as his own and held it adversely. (Br. 10–29.)

What the Board found, however, was "that in all matters business and financial in which these petitioners were interested Jacob acted for them and, not only were they agreeable to his doing this, but they expected it of him. * * * The money received by Jacob from Central was received for these petitioners and not for himself." (R. 101.) There is abundant evidence to support these findings and no evidence to the contrary. For example, there is Commissioner's Exhibit K (R. 129–130) which is a receipt for $2,422.10 representing one-third of the net insurance proceeds from the corporation signed by Jacob for each of the taxpayers. Counsel objects to its admission in evidence (Br. 29–32) because "There is no evidence that Jacob was agent for petitioners; that he was authorized by them to receive the money *for them;* or that they authorized him to sign the receipt *for them* * * *." (Br. 29.) The objection is plainly not well taken. The agency was proved by numerous uncontradicted statements in the record. Thus, Agnes Jacob, one of the taxpayers herein, testified that (R. 169)—

> My husband [Robert T. Jacob] prepared the statement regarding the stock. He is my legal adviser, and my attorney. He prepared this return. He always prepares it for me. I signed at his request. I asked no questions. I had implicit confidence in his integrity. When signing any document, I usually ask what

> it is. I knew this was my income tax return. I knew that it had something to do with Central stock.

Similarly the testimony of the other taxpayers, Beverly Jacob (R. 119–121), Gwendolyn Jacob (R. 124–126) and Shirley Jacob (R. 121–123) amply supports the Board's inference that the taxpayer's allowed Robert Jacob to handle all their affairs and had complete trust in him even to the point of signing income tax returns and other documents without knowing the reason for so doing.

Counsel relies upon the following statement from 2 Corpus Juris 935 (Br. 31) to prove the receipt inadmissible:

> The declaration of an alleged agent made to a third person in the absence of the alleged principal, which were not brought to his knowledge or ratified by him, *and not supported by other evidence,* are not competent against the alleged principal to prove the fact of his agency; and this rule that denies the competency, as against an alleged principal, of declarations of the alleged agent made to a third person in the absence of the alleged principal *is particularly applicable where the alleged principal denies the agency,* nor are such declarations competent to disprove the agency, or to prove a renewal thereof * * *. [Italics supplied.]

The statement is therefore authority for admission of the receipt to prove the agency, since there is other evidence. And it is to be noted that this it not a case where the alleged principals deny the agency. On the contrary, they affirm it.

3. Counsel next makes another factual contention again against the express finding of the Board and the uncontradicted evidence. He asserts that Jacob "retained, appropriated and used the money as his own, for his own purposes, and *in complete derogation of any right that the petitioners might have had thereto.*" (Br. 17.) Although Jacob undoubtedly had every incentive so to testify, it is significant that he did not. Apparently he could not do so. What he did testify was (R. 185):

> My reason for not giving my family the money as I intended to give them an interest in a going concern in the form of stock. The question of making them gifts of cash was not within my purpose, and I felt that would be unwise.

This is far short of saying that assuming a valid gift of the stock he would none the less retain illegally the money belonging to his family. We have observed, *supra,* that Jacob often referred to the stock and the money as his family's and nowhere does he state the contrary. Moreover, the receipt as an admission against interest by Jacob, is plainly competent evidence on the issue of whether he received the money for his family.

4. Counsel argues, however, that even if Jacob received the money for the taxpayers that transferee liability cannot be imposed short of receipt of the cash by the taxpayers since the action is *in rem.* (Br. 12.) The position is not well taken. This Court made that clear in *Hutton* v. *Commissioner, supra,* where a sole stockholder of a corporation, who on its dissolution

received all its assets, was held liable as a transferee, notwithstanding that after the receipt of the corporation's assets and before the assessment of transferee liability, Hutton paid debts of the corporation in excess of the amount of assets he received. This holding is inconsistent with counsel's contention, for if transferee liability were *in rem,* Hutton could not have been held liable after he had transferred the *res.* This Court's result in the *Hutton* case is in accord with the view expressed by others. A commentator has expressed it as follows:[7]

> The liability of the transferee, apart from his subjection to the statutory tax lien mentioned at the beginning of this article, is generally personal. It is true that in case of a fraudulent conveyance the proper remedy is merely to have it set aside by a bill in equity, and for that reason this proceeding has been called a proceeding *in rem,* but even here, in the event that the transferee has dissipated or disposed of the property so that a decree to set aside the conveyance would be either impossible or unpractical, a personal decree will be entered against him.

See also Latham, Liability of Transferees Under the Revenue Act of 1926, 22 Ill. L. Rev. 233, 397 (1927), and *Fairless* v. *Commissioner,* 67 F. 2d 475 (C. C. A. 6th). In the *Fairless* case the assets of the transferor corporation were transferred to a successor corporation in which the alleged transferees received stock. The transferees in that case contended that since all

[7] Rogge, The Transferee Liability of a Delinquent Taxpayer, 27 Mich. L. Rev. 39, 63 (1928).

the assets of the transferor were turned over to the successor, the latter was the transferee against which the deficiency should have been declared. The court said (p. 476): "we find nothing in the statute which limits collection of defaulted taxes owing by a dissolved or abandoned corporation to the transferees of its physical assets. * * *." It is plain that the holding in the *Fairless* case is inconsistent with an *in rem* theory of transferee liability. For although the assets which would constitute the *res* in an *in rem* proceeding were in the possession of a successor corporation, the stockholders of the successor corporation were held liable as transferees notwithstanding that they were only in possession of evidences of the transferred assets in the form of stock rather than the assets themselves.

Even were the liability *in rem,* counsel has not established that this action against these taxpayers who are in receipt of the assets of the corporation through their agent, must fail. Counsel's assumption that it must, is, we submit, unwarranted in light of the familiar principles of agency referred to, *supra.*

**C. Since the corporation was rendered insolvent by the payment of the liquidating dividends and was dissolved before the taxpayers were assessed as transferees, an express finding of the Board, that the Commissioner had exhausted the available remedies against the corporation, was unnecessary**

The Board found that the payment without consideration of $4,901.30 to Agnes Jacob and $5,105.52 to each of the other three taxpayers left it insolvent and unable to pay its debts. (R. 92.) This finding is amply supported by the uncontradicted evidence.

(R. 128, 157.)[8] The taxpayers were assessed as transferees on April 18, 1941 (R. 92), and the corporation had been dissolved by proclamation of the Governor of Oregon on January 6, 1941, and its articles of incorporation revoked because of failure for two consecutive years preceding to file statements or pay license fees required by law. (R. 78.)

Taxpayers contend that since the Board made no

[8] The record establishes that the only property in the corporation's name after the insurance money was paid was the ruin of the hotel and the land at Burns against which there were outstanding local taxes far in excess of its value (R. 128, 157), and two other hotel properties purchased by Barnes with his own money and transferred to the corporation gratuitously for short periods (R. 137–138, 158). The corporation did not have title to the two hotel properties after September, 1938. (R. 77–78, 138, 161, 165.) The first hotel property, purchased by Barnes, the Board found, was not transferred to the corporation until November 29, 1937 (R. 77, 137), and it was purchased with Barnes' personal money (R. 140, 158). Counsel's contention that the corporation was not insolvent (Br. 65–76) is based on distortion of the testimony. For example, counsel states that $20,422.10 remained in the corporation and he refers to page 128 of the record. At that page Conley testified, "I got $20,422.10, Barnes got a like sum, or at least it was left in the company, and Jacob got $20,422.10." It is apparent that Conley was implying that he did not know what happened to Barnes' money. But Barnes, the one person who knew, testified that he did not set the money aside as belonging to the corporation. (R. 163–164.) He testified also that he used the insurance money to buy hotel property and the money was his own. (R. 158.) It is apparent that Jacob gave Barnes questionable advice on escaping tax liability either through misinformation or in an effort to fasten liability on Barnes, thereby escaping it for himself and family. (R. 142–144, 164–167, 210.) And it is to be noted that Jacob's testimony (R. 204–209) is directly contrary to Conley's and Barnes' on the alleged sales of the Jacob family stock to Barnes, discussed *supra*, a crucial point on whether Jacob and his family were to escape liability. The Board apparently disbelieved the bulk of it.

finding that the Commissioner exhausted his remedies against the corporation, transferee liability cannot be imposed. (Br. 56–72.) They rely on *Commissioner* v. *Wire Wheel Corporation of America*, 46 F. 2d 1013 (C. C. A. 2d), affirming, *per curiam*, 16 B. T. A. 737, 741, and other cases cited at pages 63 and 64 of their brief. In the *Wire Wheel* case the Board relied on the Senate Finance Committee's report accompanying the Revenue Act of 1926. The Board quoted from that report in part as follows (16 B. T. A., p. 742):

> * * * *It is probable that under existing law The Government may proceed in equity by suit against the transferee if the transferor no longer exists (that is, in the case of a corporation, is dissolved,* or in the case of an individual, is dead), *and if the liability of the transferor has not been judicially established by action against the taxpayer before dissolution* or death—*Updike* v. *United States,* decided Circuit Court of Appeals, eighth circuit, December 1, 1925. If, however, the transferee is still in existence the Government must proceed to obtain judgment against the transferor in an action at law and then proceed against the transferee in equity by a creditor's bill to satisfy judgment. * * *
>
> * * * * *
>
> It is the purpose of the committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the act for the enforcement of tax deficiencies. It is not proposed, however, to define or change existing liability. *The section merely provides that if the liability of the*

> *transferee exists under other law then that liability is to be enforced according to "the new procedure applicable to tax deficiencies."* [Italics supplied.]

It is apparent that the principal authority of the leading case upon which counsel relies establishes that here a finding of having exhausted remedies against the corporation is unessential to transferee liability. This result is confirmed by the recognition that the requirement of exhaustion of remedies arises because transferee liability is secondary and it is first necessary to attempt recovery from the original taxpayer but where the taxpayer is a dissolved corporation no action against it is possible. It has, moreover, been expressly held in an undeviating line of decisions that even where the corporation has not been dissolved, transferee liability will be upheld nothwithstanding failure to proceed against the transferor where to do so would have been useless. *Coffee Pot Holding Corp.* v. *Commissioner,* 113 F. 2d 415, 417 (C. C. A. 5th); *United States* v. *Garfunkel,* 52 F. 2d 727, 729 (S. D. N. Y.); *Fairless* v. *Commissioner,* 67 F. 2d 475 (C. C. A. 6th). The proposition was well stated in the *Coffee Pot Holding Corp.* case, as follows (p. 417):

> The Commissioner was not required to have an execution issued and returned nulla bona before pursuing the petitioner on this claim. The law does not require doing a vain and useless thing, and, as the Board properly found that the transfer of these assets by Snell to petitioner rendered him insolvent to the extent that the tax deficiency could not be satisfied by a levy against him, the Commissioner acted within

> his rights in directly proceeding against the transferee. It is even true that the Commissioner, in the absence of insolvency, has the right to enforce the claim against the transferee without first attempting to collect the tax from the transferor. *Hatch* v. *Morosco Holding Co.,* 2 Cir. 50 F. 2d 138; *American Equitable Ass'n* v. *Helvering,* 2 Cir., 68 F. 2d 46; *Helvering* v. *Wheeling Mold & Foundry Co.,* 4 Cir., 71 F. 2d 749.

As pointed out, *supra,* the record establishes that the corporation had no assets after September, 1938, and was dissolved on January 6, 1941. As of April 8, 1941, when these taxpayers were assessed as transferees, any action against the corporation would have been futile. It is thus unnecessary for this Court to consider the competency of the testimony of Robert Ellison, a Deputy Collector (R. 145–153), and the admissibility of the warrant for distraint (R. 145–149), because the issue on which they were offered is irrelevant to liability.[9]

**D. Summary**

The Board has found that taxpayers received dividends on stock owned by them which rendered the corporation insolvent. The corporation was insolvent and dissolved before assessment of these taxpayers. No question is raised that the corporation owed income taxes, at the time the taxpayers received the dividends,

[9] Although the requirement that the Commissioner exhaust his remedies against the transferor is satisfied by showing that action immediately before the assessment of the transferee would be unavailing, this record indicates that the Commissioner did not sleep on his rights. (R. 89, 145–153.)

which have never been paid. These findings constitute all the essential elements of transferee liability. They are supported by substantial, and in most instances, uncontradicted evidence.

## II

### The doctrines of estoppel, *res judicata* and election are not applicable to bar the Commissioner

As a result of Jacob reporting in his 1937 income tax return the $20,422.10 liquidating dividend of the corporation and his filing separate returns for each of the taxpayers reporting their pro rata share of the same income together with a statement relating certain circumstances (R. 79–81), a revenue agent after investigation recommended refunds to the taxpayers which were made by the Commissioner in 1939 (R. 83).

On March 17, 1939, the Commissioner assessed deficiencies including a fraud penalty against the corporation for the fiscal years ended June, 1937, and June, 1938, and transferee liability against Jacob, Conley, Barnes and his wife for the deficiency. (R. 84.) After petitions were filed with the Board and on the second day of hearings, Jacob with the others consented to transferee liability being entered against them. (R. 84–89.) The unpaid tax of the corporation for the fiscal year ended June, 1938, was not, however, satisfied as a result of those transferee proceedings because the Commissioner had not assessed those transferees for the $6,007.82 shown on the corporation's return, but only for the deficiency determined against the corporation. (R. 89–90.) The Commissioner's attempts to reopen the case before the Board

to include judgment for the original tax of the corporation were unsuccessful. (R. 89–92.)

1. On the basis of the refund to these taxpayers for the tax paid on the liquidating dividend and the transferee liability entered against Jacob by consent, counsel asserts that the Commissioner is "estopped" to assert transferee liability against these taxpayers. (Br. 32.) It seems too clear to require argument that the Commissioner is not estopped in the equitable sense of that term. There are numerous elements constituting equitable estoppel which must be proved by he who claims it.[10] The conduct alleged to estop must be relied upon by the party claiming estoppel (*Crane* v. *Commissioner,* 68 F. 2d 640 (C. C. A. 1st); *Grouf* v. *State Nat. Bank of St. Louis,* 76 F. 2d 726 (C. C. A. 8th)) and he must in fact act upon it in such a manner as to change his position for the worse. See *Commissioner* v. *New York Trust Co.,* 54 F. 2d 463 (C. C. A. 2d), certiorari denied, 285 U. S. 556; *Helvering* v. *Brooklyn City R. Co.,* 72 F. 2d 274 (C. C. A. 2d). The taxpayers do not here allege, much less have they proved, reliance or detriment. It is impossible to see how an erroneous refund of taxes to the taxpayer or transferee liability against another is in the least detrimental to the taxpayers.

2. Counsel apparently contends that the refund to the taxpayers and the consent judgment of the Board upholding transferee liability against Jacob are *res judicata.* It is clear that the act of the Commissioner in refunding certain of the 1937 income taxes of the

[10] Mertens, Law of Federal Income Taxation, 599–601.

taxpayers is not *res judicata.* The doctrine or *res judicata* as explained by the Supreme Court in *Southern Pacific Railr'd* v. *United States,* 168 U. S. 1, 48, is that a "right, question or fact distinctly put in issue and directly determined by a *court of competent jurisdiction,* as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies * * *." (Italics supplied.) Certainly a refund by the Commissioner is not a determination by a "court of competent jurisdiction."[11]

It is apparent also that the consent transferee liability[12] determined by the Board against Jacob is not *res judicata* for the reason that the parties are not the same. See *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620; *Southern Pacific Railr'd Co.* v. *United States, supra.* In the prior proceeding Robert T. Jacob was the party. Here the parties are Agnes Jacob, Shirley Jacob, Beverly Jacob and Gwendolyn Jacob. Counsel contends that the *Western Maryland* case is "con-

[11] See *Union Metal Manufacturing Co.* v. *Commissioner,* 4 B. T. A. 287, and *Canyon Lumber Co.* v. *Commissioner,* 4 B. T. A. 940, where it was held that even the Board of Tax Appeals' decision could not be *res judicata* because under the Revenue Act of 1924 its determinations had no finality. A determination of the Commissioner is an a *fortiori* situation.

[12] The judgment of the Board that counsel contends is *res judicata* was entered on stipulation. (R. 88–89.) But the doctrine is not applicable by reason of an original judgment entered on stipulation. See *Volunteer State Life Insurance Co.* v. *Commissioner,* 35 B. T. A. 491, reversed on other grounds, 110 F. 2d 879 (C. C. A. 6th). There is no judicial process in a Board decision on stipulation since the Board merely approves a settlement of the parties. *United States* v. *Globe Indemnity Co.,* 17 F. Supp. 838 (S. D. N. Y.), affirmed, 94 F. 2d 576 (C. C. A. 2d).

trolling here." (Br. 37.) In that case the parties were a Collector of Internal Revenue and the Western Maryland Railway Company. The issue was whether an amortized proportion of the discount on the sale of bonds issued by two predecessor companies recognized by the taxpayer as its obligations could be deducted by it. The same issue had been previously litigated except that different tax years were involved and the Commissioner of Internal Revenue rather than the Collector was a party. The Court said (p. 623):

> 1. The scope of the estoppel of a judgment [13] depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. * * *

The Court held that the prior action was *res judicata* because the question was the same in each and the parties were the same since the Collector, because he is an inferior agent acting under the Commissioner is in such privity that he is estopped, i. e., the previous judgment was *res judicata*. Certainly the case is not authority for holding that (1) a refund by the Com-

[13] Estoppel by judgment is synonymous with *res judicata*. Paul, Selected Studies in Federal Taxation (Second Series) 107, 108. It is an entirely different doctrine from equitable estoppel discussed, *supra*.

missioner can be *res judicata* or (2) Robert T. Jacob is a party or privy of the taxpayers here. On the contrary the case recognizes the necessity of a prior action and identical parties or their privies. It is therefore authority for rejecting counsel's contention.

The proposition that there is no principle which prohibits the Commissioner from taking inconsistent positions in cases involving other parties, moreover, has been affirmatively passed upon. *Igleheart* v. *Commissioner,* 77 F. 2d 704 (C. C. A. 5th); *Gwin* v. *Commissioner,* 14 B. T. A. 393, affirmed on this point *sub nom. Lincoln Bank & Trust Co.* v. *Commissioner,* 51 F. 2d 78 (C. C. A. 6th), certiorari denied, 285 U. S. 548; Griswold, Res Judicata in Federal Tax Cases, 46 Yale L. J. 1320, 1345–1347 (1937). In the *Igleheart* case in which the Commissioner contended a trust was established in contemplation of death, the Board refused to take judicial notice of its determination in a prior case in which the Commissioner prevailed in his position that the very trust instrument involved in the subsequent case was not made in contemplation of death. The Circuit Court after pointing out that neither of the parties in his or her executional capacity was involved in the earlier case stated (p. 713):

> The fact, if it was a fact, that in the other case the respondent took a position inconsistent with one taken by him in the instant case would not justify or excuse a failure of the Board of Tax Appeals, or this Court to sustain a correct position taken by the respondent in the instant case. * * *

The position thus expressed must have particular applicability where the prior action of the Commissioner resulted in a benefit to the taxpayers—namely, a reduction of their transferee liability.

3. Counsel apparently relies also on a doctrine of irrevocable election for which he cites *United States* v. *Brown,* 86 F. 2d 798 (C. C. A. 6th). (Br. 37.) Election has been defined as "the choice of one of two rights or things, to each of which the party choosing has an equal right, but both of which he cannot have." 10 Mertens Law of Federal Income Taxation 646. The court in the *Brown* case viewed the principle similarly, 86 F. 2d 798, 799. In that case the Sixth Circuit denied transferee liability where the Board in a prior case which was not appealed upheld a tax on income of the transferees which included the amount of the assets for which transferee liability was imposed. The court said that the taxpayers were liable either as transferees or for a tax on the transferred assets but not both since the transferred assets if they constituted a trust fund for the creditor were not income. The Commissioner by refunding the tax paid on the transferred assets by the taxpayers here involved, did exactly the opposite of what was done in the *Brown* case and that decision is therefore authority for upholding his action in proceeding against the taxpayers as transferees rather than taxing them as recipients of income.

The *Brown* case clearly has no application to the action of the Commissioner in assessing Jacob as a transferee because the statute did not permit an

election between holding Jacob as transferee on the one hand and his family on the other as recipients of the same assets. There was not a choice between "one of two rights."

This Court, in *Peir* v. *Commissioner, supra,* rejected a similar contention. In that case the Commissioner had proceeded against a successor corporation and the corporation had paid the tax assessed under protest. The *Peir* case upheld assessment of transferee liability against the president of the transferor corporation, notwithstanding the prior assessment of a successor corporation. The Court there said (p. 649): "The fact that respondent proceeded against Air Reduction did not, we think, amount to an election of remedies preventing assertion of the remedy against petitioners. *Pierce* v. *United States, supra,* 255 U. S. 398, * * *."

The line of cases marked by the *Igleheart* case, *supra,* moreover, demonstrates that an inconsistent approach where different parties are involved is not a bar to the Commissioner.

Finally, these taxpayers have no claim to consideration by this Court on the ground that the Commissioner is acting unjustly or that they have a strong equitable position. Counsel states, for example, that "the Government ought to turn square corners when dealing with its citizens." (Br. 39.) A case where, in light of this record, that admonition is more singularly out of place is difficult to imagine. It suffices for summary to point out that although these taxpayers received a portion of the assets of the corporation which prevented it from paying the tax it admittedly owed, they urge in derogation of their transferee liabil-

ity an erroneous refund of income taxes which benefited them and a proceeding against another as transferee which to the extent the judgment resulted in a satisfaction of the corporation's tax reduced these taxpayers' liability *pro tanto*.

## CONCLUSION

The decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted.

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JUNE, 1943.

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No. 10390

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

AGNES C. JACOB, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

SHIRLEY HAY JACOB, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

BEVERLEY JEAN JACOB, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

GWENDOLYN E. JACOB, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

## PETITIONERS' REPLY BRIEF

On Petitions for Review of the Decisions of the United States Board of Tax Appeals.

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FILED
JUL 26 1943
PAUL P. O'BRIEN,
CLERK

STEVENS-NESS LAW PUB. CO., PORTLAND

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No. 10390

# In the United States
# Circuit Court of Appeals
## For the Ninth Circuit

AGNES C. JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

SHIRLEY HAY JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

BEVERLEY JEAN JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

GWENDOLYN E. JACOB, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

## PETITIONERS' REPLY BRIEF

On Petitions for Review of the Decisions of the United States Board of Tax Appeals.

## I
## RE JURISDICTION TO DETERMINE ADDITIONAL TRANSFEREE LIABILITY

The validity of respondent's answer to petitioners' contention that respondent is barred by Sec. 272 (f) from prosecuting this proceeding must be considered in the light of the following fact situation.

Jacob, Conley and Barnes are alleged to have received between them in excess of $60,000.00. The total tax liability was but a small fraction of this amount. In the prior transferee proceeding against Jacob, Conley and Barnes, respondent sought to enforce liability for the amount of the deficiency only—a portion of the total tax liability for the "taxable year." The transferee liability for the entire tax for the taxable year could and should have been determined in that proceeding, notwithstanding the fact that the notice of liability was for a part (deficiency) only, because Sec. 272 (e) provides:

> "The Board shall have jurisdiction to determine the correct amount of the deficiency (transferee liability) even if the amount so determined is greater than the amount of the deficiency (transferee liability) notice . . . . . if claim therefore is asserted by the Commissioner at or before the hearing or a rehearing."

After the entry of the decision in that proceeding respondent moved to vacate the decision, to open the proceeding and to permit him to file an amended answer asserting transferee liability for the entire tax for the "taxable year." The Board denied this motion because it was not timely (tr. p. 43 and 51).

The Board had jurisdiction to determine the whole transferee liability in that proceeding. **(Peerless Woolen Mills vs. Rose, 28 Fed. (2) 661, American Woolen Co. v. White 56 Fed. (2d) 716, Bankers Reserve Life Insurance Co. v. U. S. 44 Fed. (2d) 1000)**

In **Lehigh Portland Cement Co. v. U. S., 30 Fed. Supp. 217,** the Court, referring to the legal effect of a petition for review filed with the Board of Tax Appeals held:

> "Upon this appeal the jurisdiction and authority of the board and the appellate courts extended not only to the amount of the additional deficiencies last determined by the Commissioner, but to the entire tax liability including the original tax paid."

If respondent was aggrieved by that decision and deemed it erroneous, his remedy was by appeal to this court. He did not appeal and that decision became final.

Respondent exhausted jurisdiction to proceed against Jacob, Conley and Barnes to impose **"any additional"** transferee liability.

Having prosecuted a transferee proceeding against the persons who were the alleged transferees of **all** the corporate assets, respondent is precluded from prosecuting any other proceeding to enforce "any **additional"** liability.

This is not a case where Jacob received part of the corporate assets and these petitioners another part of the corporate assets. Here one or the other—not both—received all the corporate assets. Either Jacob was liable as transferee of the assets or these petitioners were liable, not both.

The transferee liablity determined in the former proceeding was satisfied in full.

Neither was this a case where the commissioner is unable to satisfy in full the judgment for transferee liability against one transferee. In such a case, respondent could, of course, proceed against another transferee of **other** assets to satisfy the balance of the tax liability.

The liability of Jacob and of these petitioners, if any there be, is not joint and several as in the case where several transferees receive parts of the assets of the corporation. Having prosecuted the transferee proceeding against the one deemed liable and having obtained a recovery against him in full of the amount claimed and adjudged, the jurisdiction to enforce a "any additional" transferee liability was exhausted.

The **first** contention of respondent is to the effect that the limitation in Sec. 272 (f) (which precludes the respondent from making more than one assessment for one "taxable year") does not apply to transferee proceedings because, it is asserted, the section deals with "additional deficiency" and not with "transferee liability." The contention is untenable

Since Sec. 311 makes Sec. 272 (f) applicable, subject "to the provisions and limitations," the language of Sec. 272 (f) must be transposed to read as follows:

> "If the Commissioner has mailed to the taxpayer (transferee) notice of a deficiency (transferee liability) . . . . . and the taxpayer (transferee) files a petition with the Board . . . . . the Commissioner shall have no right to determine **any additional** deficiency (transferee liability) in respect of the same taxable year."

The dominant words in that section are "any" and "additional". These are comprehensive terms. They are applicable to any transferee liability. Having prosecuted a proceeding for one part of the transferee liability it precludes prosecution of a proceeding involving **"any additional"** transferee liability.

The respondent was obliged to pursue either Jacob or these petitioners, but, whichever one he pursued, he would have to assert and obtain a determination of the tax liability for the **entire "taxable year"** in the one proceeding.

If in the prior proceeding it had been determined that Jacob was not the transferee, respondent could have proceeded against another party who was the transferee.

In either proceeding (deficiency or transferee) it is the notice of assessment that initiates the proceeding and invokes jurisdiction. The limitation upon the jurisdiction of the Commissioner was designed to prevent the splitting of claims and to insure the determination of all questions pertaining to a single tax year in one proceeding.

Respondent claims that through inadvertance the prior transferee proceeding was invoked only as to a part of the liability for the "taxable year". If that be true, respondent had a right and it was his duty under subdivision (e) of Sec. 272, to present to the Board in that proceeding before the close of that case, the

additional claim. Having failed to present that claim timely and having failed to appeal from the decision of the Board denying his motion to reopen the case, respondent is foreclosed by subdivision (f) from prosecuting another proceeding for "additional" tax liability for that "taxable year".

The **second** contention is that Sec. 272 (f) is not applicable because no "prior deficiency" was assessed against the petitioners.

The limitation is against determining "any additional" deficiency (transferee liability) in respect of the "same taxable year." It does not preclude proceeding only against the **same party** alleged to be transferee, but against anyone if it involves the same taxable year. The words "any additional" are not qualified by the phrase "against the same party" or words to that effect.

The only requirement as to notice is that it be given to the taxpayer (transferee). If notice was given to a transferee for a **part only** of the tax liability (when he could have been proceeded against for the entire liability), then the statute precludes respondent from taking any proceeding against anyone for "any additional liability.

Notice of assessment was given to Jacob in the prior proceeding for a part only of the tax liability. He could have been proceeded against for the whole of the tax. He petitioned for review and determination was made that he was transferee and liable as such for the

amount claimed. **This exhausted the Commissioner's jurisdiction** under the statute to proceed against any one for "any additional" tax liability.

There can be but one transferee proceeding against the parties alleged to be transferees of a **single asset.** But there can be as many proceedings as there are separate transferees.

The distinction which respondent seeks to make between the liability for the "deficiency" in tax and the tax disclosed by the return, as to which there was no dispute, was rejected by **this court** in the **Ventura case, 86 Fed. (2d) 149, (9th Cir.).** See text of opinion, page 43 of Appendix.

The **third contention** is that if the petitioners' views prevail it would prevent the Commissioner from "following more than one transferee" if the Commissioner was unable to obtain satisfaction of transferee liability determined against one transferee.

The hypothetical cases referred to by counsel for the respondent are those in which **several transfers** were made to **separate transferees** who would become severally liable for the corporation's tax liability. Each transferee would be liable to the extent of the assets received by him and each transfer could properly be prosecuted as a separate proceeding until the full tax liability was satisfied.

Adoption of petitioners contention would not preclude such proceedings. In the case at bar there were no separate transfers of separate funds to Jacob and

to the petitioners. **They were neither jointly or severally liable.** Only one or the other was liable, if there be any liability at all. Having asserted liability against the one deemed to be the transferee and having obtained a determination and satisfaction of the liability asserted, the Commissioner became subject to the limitation of the statute.

## II

## RE SCOPE OF REVIEW BY THIS COURT

It is argued that these "appeals largely involve questions of fact." That is not true. The contention that the findings are not supported by evidence presents a question of law. The contention that the Court below failed to apply legal tests to the appraisement of the evidence and in determining the probative valuc of the evidence presents a question of law. The crucial question whether petitioners can be held liable as transferees by reason of the receipt of the fund by Jacob and retention by him under claim of right, presents a pure question of law upon the undisputed and uncontradicted evidence.

In **U. S. v. Lam, 26 F. (2d) 830,** the court, in denying transferee liability, said:

> "The burden is on the government to prove that Lam received this $38,500 as a stockholder of the corporation. It has wholly failed to sustain this burden."

Respondent's assertion that the statute which places the burden of proof upon the respondent merely

requires the establishment of a prima facie case is without justification. When the Congress imposed upon the respondent the burden of proof, in transferee cases, it used the term "burden of proof" in the same sense as the term "burden of proof" is used in connection with the trial of deficiency cases before the Board of Tax Appeals. It has been repeatedly held that in deficiency cases the burden of proof is to establish the petitioner's case by a preponderance of evidence. **Merten's Law of Fed. Income Taxation, Vol. 9, p. 283.** It may be true that where the Commissioner establishes a prima facie case **and no showing whatever is made by the petitioner,** that the prima facie case would be sufficient to sustain a finding of fact. But that is not true where the petitioners introduce evidence contrary to the prima facie case. The Commisisoner must then establish his case by a preponderance of the evidence and in appraising the evidence the Board must follow legal principles. It cannot refuse to believe what as a matter of law it should believe.

In **Blackmer v. Commissioner, 70 Fed. (2d) 255,** the Court held:

> "When the evidence before the Board, as the trier of the facts ought to be convincing, it may not say that it is not. (Citing cases.) And the **Board may not arbitrarily discredit the testimony of an unimpeached taxpayer** so far as he testifies to facts. A disregard of such testimony is sufficient for our holding that the taxpayer has sustained the burden of establishing his right to a reduction and error has been committed in a contrary ruling."

It can not arbitrarily ignore the inferences which must be drawn in favor of the petitioner. It can not refuse to accord to the petitioner the benefit of presumptions which the law recognizes.

The **Hutton case, 59 F 2d. 66,** decided by this court does not support respondent. In that case **there were no issues of fact. All of the facts were stipulated or admitted by the pleadings.** Hence there was only a question of law for the court to determine. The basic fact that the assets were transferred to the petitioner was admitted.

In the case at bar petitioners did not receive the money as Hutton did in the case cited. Therefore the basic fact upon which the transferee liability depends is in dispute. Upon that issue respondent had the burden of proof. The showing that Jacob received the money did not create even a prima facie case against petitioners. The Commissioner was required to establish by a preponderence of the evidence the facts which would impose liability upon them for Jacobs' acts. It is a question of law whether there is evidence to sustain such a finding.

In the case at bar the Commissioner traced the funds into the hands of Jacob but failed to establish facts which would trace the funds into the hands of the petitioners or make them liable for the receipt of the fund by him.

The other questions raised are all questions of law.

## III.

## RE OWNERSHIP OF STOCK

Respondent makes the contention that petitioners were the owners of the **stock** which was surrendered by Jacob when he received the fund in question.

We submit (1) that the ownership of the **stock** is an irrelevant fact in this case and (2) that the evidenciary facts referred to do not establish ownership of the stock by petitioners in any event.

The **stock** was not the property of the corporation. The **corporation did not transfer the stock** to petitioners or anybody else. The **subject matter of the transfer is the $20,400.00** which was received by Jacob. The sole question is whether petitioners received **this money** and **not whether they owned the stock.** If they received it they are transferees if the other elements are present, whether or not they were the owners of the stock. If they did not receive it it is immaterial whether they owned the stock or did not own the stock. In a large sense it is not even relevant or material whether petitioners acquired any beneficial right to the money, which they could enforce against Jacob. As long as Jacob retains it and insists that it is his own Petitioners are not transferees of that property. A mere right to recover the fund cannot make them transferees.

It is highly significant that **not a single case is cited in which a transferee liability was imposed upon any one who did not actually receive the assets which were being followed.** Nor is any judgment creditors action

cited in which a liability was imposed upon any one who did not actually receive the assets which are alleged to have been transferred by the judgment debtor.

Now all of the evidenciary facts which are referred to by respondent (Br., pp. 27 to 37) merely go to establish **Jacob's intention to make a gift of the stock**—not the fund—a fact which he never disputed, but freely conceded. But his intention to make a gift of the stock or even the actual delivery of the **stock** could not make petitioners liable as transferees of the **money** received by Jacob. To establish that liability it was necessary to establish that Jacob intended to make a gift of the **money** (not the stock) and that he did, in fact, complete that gift by delivering and surrendering all dominion and control of the money to such an extent that he would become liable for conversion if he again took possession thereof, for that is the asset that is alleged to have been transferred and which is being sought in this proceeding in rem.

In **Allen-West Commission Co. v. Grumbles (C.C.A., 8th Cir.), 129 F. 287,** the court held:

> "* * * Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and **irrevocably divest himself of the title, dominion,** and **control** of the subject of the gift **in praesenti** at the very time he undertakes to make the gift (Citing cases); the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, **so that the donor can exercise no further act of dominion or control over it** (citing cases); and the delivery by the donor to the donee, of the subject of the gift or of the **most effectual means of commanding the dominion of**

> **it.** This delivery must be an actual one 'so far as the subject is capable of it * * *' * * *"
>
> . . . . . .
>
> "There can be no gift which the law will recognize where there is **reserved** to the donor, either expressly or **as a result of the circumstances** and conditions attending the transaction, **a power of revocation or a dominion** over the subject of the gift. There can be no locus penitentiae, and there is always a locus penitentiae where the supposed donor may at any moment undo what he has done."

Obviously the gift of the fund (not the stock) was not irrevocably transferred within the purvue of these decisions. Jacob at all times had dominion and control over the stock and the fund to such an extent that he **could and did** revoke his intention.

If Jacob had failed to pay income tax on the profit derived from the receipt of the fund and had claimed the profit to be the revenue of the petitioners herein, respondent would most certainly have assessed a deficiency in tax as he did in the **Weil case** (discussed pages 4 to 10, Appendix of former brief).

All of respondent's discussion at this point is devoted to demonstrating that Jacob **intended** to deliver the stock to the members of his family, but nowhere in this discussion (pp. 27-29) is any reference made to testimony by Jacob to the effect that **he gave** the stock to the members of his family. The sum and substance of all of the testimony is that between July 26 and July 31, he asked Miss Alstrom, the stenographer in his office to prepare the certificates in the names of the members of his family (Tr. pp. 183-184). He then

sent them to Seaside, Oregon, (**before they were executed**) with the request that the members of his family sign the blank endorsements on the back and return them to him. This was done. He testified:

> "They were endorsed as of August 10th and returned. **I retained them in my possession until August 17th when I delivered them to Barnes."** (Tr. p. 184.)

We did not say that the certificates were never executed. We said that the certificates were not executed **"at the time"** (former brief, p. 15) **they were sent to the members of the family to have the endorsement signed** by them and that they were **not executed until August 18th**, when Jacob delivered them to Barnes, which was the day after Jacob received the $18,000.00. **Barnes testified that they were executed on August 18th.** (Tr. 160-162)

Under these circumstances the sending of the certificates to the petitioners with the request that they sign the blank endorsement and return them to Jacob cannot possibly constitute a delivery of the certificates to them. The evidence is clear and unequivocal that after Jacob received the certificates, about August 10th, he retained them in his possession until August 17th (p. 184).

The petitioners were never given the certificates at any time **after they were executed by the officers of the corporation.** They endorsed unsigned certificates in blank and pursuant to his request they returned them to Jacob. He retained them and delivered them to

Barnes. There is no escape from these evidentiary facts. The inevitable conclusion to be drawn therefrom is that there was no delivery of the stock to petitioners and they never acquired title thereto.

It is argued, p. 29, that "Jacob clearly did not say . . . . that he did not give the stock" to petitioners, and that he did not say "that he ever abandoned an intention to give it (the stock)" to petitioners. While it is true that Jacob did not in his testimony use the quoted words, his evidence nevertheless establishes that fact for he told exactly what did in fact happen, from which the conclusion is inevitable that he did not give them the stock. When he says that the members of his family endorsed the unsigned certificates and returned them to him and that he kept them in his possession until he turned them over to Barnes, **it was unnecessary for him to state the converse**—that he did not give the certificates to his family. That follows as a matter of course. It is likewise true that he did not use the exact words "I abandoned my intention to give the stock to the members of my family." But that conclusion is inevitable from the testimony as to what was done. He did not in fact give them the stock and he did in fact turn it over to Barnes. The reason is obvious. He had agreed to turn over the stock to Barnes and he was to receive the $20,400 in exchange for it. He had come to the conclusion that it would be inadvisable to give the members of his family cash. He obviously did abandon his intention to give them the stock. It was not necessary for him to make a statement in negative form.

It must be remembered that the burden of proof that the gift of the **stock** was completed (if that be a material fact) was on the Commissioner. He was the one who had to establish the completion of the gift. The burden was not upon petitioners to establish the negative. Hence no inference unfavorable to petitioners could in any event be drawn from the failure of Jacob to testify negatively as to the facts upon which he gave affirmative testimony **(22 C.J. 112—former brief, p. 75).**

We repeat that the fact of the ownership of the stock is irrelevant for that is not the subject of the transfer. It is the **possession** (not beneficial ownership) of the $20,400.00 which is the only essential and material fact upon which transferee liability depends.

## IV.

## RE LIQUIDATION OF THE CORPORATION

Respondent does not in his brief controvert petitioner's contention that this case is ruled by the decision of this court in **U. S. v. Boss & Peake, 285 F. 410 and 290 F. 167 (9th Cir.),** nor is any attempt made to distinguish the case upon the facts or the law.

No attempt is made to distinguish the case at bar from the group of cases cited and discussed (pages 51-55 of our former brief) upon this phase of the case.

What is more significant is that not a single case is cited in which it was held that upon facts similar to

those in the case at bar the transaction constituted a liquidation of the corporation.

The portion of the opinion of the court below quoted in the brief, pp. 29-30, does not supply any findings of fact lacking in the formal findings. It is merely the conclusion of the court below which it drew from the evidentiary facts in the case. The court below drew the conclusion that there was a liquidation from the fact that Jacob and Conley "decided not to continue in the hotel business." That circumstance had no probative value upon the issue whether the transaction was a sale of the stock or a liquidation of the corporation. Their desire to get out of the hotel business could be accomplished as well by a sale of their stock to Barnes as by liquidation of the corporation. The statement in the opinion that Barnes had no intention of buying the stock was the court's conclusion, and not a statement of fact. It drew that conclusion because it regarded the corporation as a "shell". This corporation was not merely a "shell", for it had left $20,400.00 which both Barnes and Conley said remained in the corporation. Before any money was paid out to Jacob or Conley the corporation had already purchased the Hines property and thereafter acquired Arlington Hotel property and operated it. Such a corporation never has been held to be a corporate shell.

The Court's statement that Barnes took down a pro rata of the insurance proceeds was an erroneous interpretation of the transaction for Barnes himself in his letter, Exh. 5, said (p. 166):

"The money that was **left in the Central Holding Company** I can account for to the last penny."

and he said that this had reference to the $20,400 (p. 168). Conley said that this money remained in the corporation (p. 128) and part of that money ($5,000 of it) was used in the purchase of the Arlington hotel and another part ($4,000) was used in furnishing and repairing the hotel.

We submit that there was no finding of fact in the opinion which could supply the deficiency in the formal findings of fact made by the Court.

The assertion is made that petitioners' argument (pp. 46-56 of our former brief) upon this phase of the case is "without factual support except in the impeached and contradicted testimony of Jacob".

Now we set out in our argument a catalog of evidentiary facts upon which our argument was based. And we submit that it is not sufficient to charge that these facts are contradicted and the witness impeached. Fairness to the Court and petitioners required specific reference to the statements contradicted and to the testimony constituting contradiction or impeachment.

Reference is made to excerpts from Barnes' testimony (pp. 30-31) in which he speaks of he payment of the money as "distributions"; that he "treated as his own" the $20,400. This was merely Barnes' interpretation of the effect of the transaction.

How can Barnes' interpretation that the $20,400 was his own money be sustained or justified in the face

of his written declaration made in January, 1938, that the money **"was left in the Central Holding Company"** and that part of it was actually used in the purchase of property by the Central Holding Company which was owned and operated by it.

How can Barnes' interpretation that he treated the corporation "as a name only" be reconciled with the fact that he actually intended and desired the corporation to function so that he could borrow money in the name of the corporation with which to rebuild or purchase other hotel property. Barnes stated in the same letter (Exh. 5, p. 165) that he was told by Jacob:

> "If the company was not carried on and we divided up the money it would cost both you and Conley and myself a thousand dollars apiece for income tax. You said if I carried on the company and built the hotel or bought a hotel, in case I did either one of these things, I could then turn the Central Holding Company back to myself, and there would be no income tax.
>
> "I relied upon you as an income tax man and followed through as per your instructions."

Now Barnes' statement as to Jacob's advise is substantially in accordance with the letter which Jacob wrote on August 18th. (Exh. 4, p. 142.) In that letter he quoted the statute, called attention to the fact that it required that the money be expended in acquisition of other property. He advised that it was **"absolutely necessary that you keep the Central Holding Company alive for the purpose of replacing the property"** and that the property must be acquired "in the name of the Central Holding Company" and so forth. Obvi-

ously Barnes contemplated following the procedure given to him orally and repeated in the letter, all of which contemplated that the corporation should be real and not a shell; that it was to be the owner of property and function as such until such time as "you and such other stockhelders as you may have in the company" may desire to liquidate the corporation.

It was clearly contemplated that liquidation of the corporation should take place only as and when the stockholders should deem it advisable, but only after the corporation had functioned as such, in the manner contemplated by the statute and in the advise given by Jacob to Barnes and Conley. The corporation did so function.

In the face of these uncontroverted facts, it is obvious that Barnes' characterization as to the corporation being a name only and that he "treated the money as his own" has no probative value and cannot influence the legal effect of the transaction as it was actually contemplated and carried out.

In the **Boss & Peake case,** decided by this court (a transferee case in which one of the stockholders acquired the stock of the other stockholder) the District Court actually found that upon the oral testimony there was a preponderance of the evidence in favor of the determination that the transaction was a liquidation. Nevertheless the Court rejected that oral testimony and held the transaction to be a sale of the stock by one stockholder to the other (although corporate assets were used to pay therefor), because the legal

effect of what was done constituted a sale, not a liquidation, and **this court affirmed the judgment.** We submit that the transaction in the case at bar must be considered and determined according to its legal effect and not according to the interpretation of Mr. Barnes.

## V.

## RE CONTENTION THAT RECEIPT BY JACOB WAS THE RECEIPT BY PETITIONERS

It is not contended by respondent that the fund in question actually came into possession of the petitioners. It is only contended that receipt of the fund by Jacob was constructively receipt by petitioners which subjects them to transferee liability.

Here again it is highly significant that **not a single case is cited where transferee liability was imposed on anyone who did not actually receive the assets pursued** where the assets were received and retained under claim of right by someone other than the party proceeded against. Indeed, no case is cited imposing transferee liability on the theory of constructive receipt even where there is a conceded relationship of principal and agent or trustee and beneficiary.

It is also significant that no attempt is made to distinguish the authorities we cited (pp. 19-27) in support of our contention that transferee liability cannot be predicated on the theory of constructive receipt especially when the party receiving the property does so under a claim of right and retains the same adversely

to the parties proceeded against.

In **North American Oil Consolidated v. Burnett, 286 U.S. 417,** the Supreme Court held that the taxpayer was not taxable on account of income which "it had not received and which it might never receive."

In **Gutman v. Commissioner, decided by The Tax Court of The United States, December 29, 1942, Docket No. 107985,** the Board in rejecting the contention of constructive receipt said that "to charge the petitioner with income . . . which he did not receive and might never receive . . . would violate the realism in the law of taxation of income."

In **Commissioner v. McCall, 26 B.T.A. 292,** the Board declined to impose **transferee liability** on a beneficiary where the funds were received by and were still in the possession of the trustee.

The **Maryland Casualty Co.** case and **Schaupp** case, cited on page 32 are not transferee cases. Both were proceedings against the taxpayer for deficiency in tax.

In the **Maryland Casualty Co. case** agents of an insurance company collected premiums for the company in December but did not remit them to the company until the following January. The sole issue was whether the company was obliged to report those premiums as revenue as of the time when they were collected by the agents or as of the time when the agents remitted to the company. The Supreme Court held that the receipt by the agent constituted for income tax purposes the receipt by the company because

under the contract the company had control over that fund so that even while it was in the hands of the agent the company could direct the agent to use the fund in payment of claims against the company.

This case does not apply to the case at bar, because in the case cited there was no issue as to the ownership and control of the fund. It was a consentual agency. The agent did not and could not claim any right to retain the money in his own right adversely to the interest of the company as Jacob did in the case a bar.

In the **Schaupp case, 71 Fed. 2d 736,** cited by respondent, the taxpayer had a life estate in the property of her deceased husband. Her son was the residuary legatee. He managed the property and collected the income. During the tax year in question, the property had earned $13,000.00, which income belonged to the taxpayer, but she only drew $200.00 a month and allowed the remainder of the income to be left in the possession of her son. The son claimed no right, title or interest in the excess revenue. He held it for his mother. The court held the entire income taxable because

> "It belonged to her, and she had the right to withdraw, appropriate, and use it. As was said by the Supreme Court in Corliss v. Bowers, 281 U. S. 276, 50 S. Ct. 336, 337, 74 L Ed. 916:
>
> " 'The income that is subject to a man's **unfettered command** and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.' "

Obviously, petitioners in the case at bar did not have the **"unfettered command"** of the fund which Jacob received under claim of right. Petitioners were not "free to enjoy at their own option" the money received by Jacob under claim of right.

The conclusion that Jacob was acting for petitioners is predicated upon testimony by Mrs. Jacob, one of the petitioners, to the effect that her husband prepared the income tax returns and gift returns (which she called statement regarding the stock) for her "as my legal advisor and my attorney", that she signed at his request because she had implicit confidence in his integrity. We submit that this does not warrant a legal conclusion that Jacob was her **agent to sell her property** without her knowledge or consent **or to receive money** in payment of her property **or to execute receipts** on her behalf. We have never heard it suggested that an attorney who has authority to prepare an income tax return for his client also has authority to dispose of his client's property or to bind him by declarations of which the client has no knowledge. Many husbands and fathers have from time to time prepared papers for members of their families, but no one would suggest for a moment that that conferred upon him authority to dispose of their property without their knowledge or consent.

Respondent supports the contention of agency by pointing to the receipt signed by Jacob, but that was merely **Jacobs' own declaration**. Agency is never established by ex parte declarations. There is not a scin-

tilla of evidence that Jacob ever handled any transaction for any of the petitioners which involved the disposition of property owned by them or which involved the receipt of money by him for their account or in which he executed papers for them with their knowledge and consent from which agency might be inferred. The three daughters had no interests or business affairs in which Jacob acted for them. Their only property consisted of the promise which he made to give the stock to them, and the preparation of income tax returns for them which resulted from the promise to give them the stock. Other than that there is no evidence of any course of conduct from which agency could be inferred so as to impose upon them personal liability for his receipt and appropriation of the fund in question.

## VI

## RE RETENTION OF FUND BY JACOB

It is argued that Jacob did not testify in so many words that he appropriated the mony "in complete derogation of any right that the petitioners may have had to it." It is, of course, true that Jacob did not use these words, but the sum and substance of his testimony leads to that conclusion. Respondent only calls attention to a fragment of his testimony upon this subject. He testified that after he received the $2400.00 he gave no part of it to petitioners, nor did he put in a special fund for them. He utilized it for his own purposes (p. 183). When he received the

$18,000.00 he gave no part of that mony to any member of his family. He did not give them money or the equivalent of money, either in the form of bank deposits or other equivalent of money. He did not set it aside or deposit it in any trust fund or other account for them. "I used it for my personal needs. I never conveyed any property of any kind to any of them in lieu of that money." (p. 184) **This was the testimony of appropriation of the funds by him for his own use.** The portion of his testimony which is quoted on page 35 of respondents brief states his reason for the appropriation of the fund by him and that was in substance that he had intended to make them a gift of the **stock** (not the money). But when the conditions suddenly changed, he abandoned his intention to make a gift of the stock and appropriated the money that he received from the disposal of the stock. It is not true as asserted in respondent's brief, p. 35, that Jacob often referred to the "money" as his family's and that "nowhere was it stated to the contrary." The very testimony which respondent quoted says so. He testified:

> "The question of making them gifts of cash was not within my purpose and I felt it would be unwise."

In this case, we are not concerned with the ultimate determination of the legal ownership of the **stock.** He believed that he had the right to change his mind about giving his family the stock and the proceeds which he received from the disposition thereof.

Whether he was legally correct in his conclusion is wholly immaterial. The material fact is that, believing that he had the right to do so, he exercised his prerogative and retained the money as his own. When he testified to the appropriation of the fund to his own use, it was the highest type of evidence that he did so in derogation of any right petitioners may have had thereto. If he had used the words in his testimony that he appropriated the money in derogation of petitioners' rights, respondent's counsel would promptly have objected to it as a conclusion. Whether he retained it in derogation of petitioners' rights is determinable from the testimony as to what he did and his reasons for doing so, and when his conduct is appraised in this respect, it is obvious that he did appropriate the money in derogation of petitioner's right thereto. Whether he was right or wrong in doing so is beside the point. The fact remains that they did not get the money because he believed they were not entitled to it and hence they could not be charged with personal liability.

The only time that a transferee can be charged with personal liability, as distinguished from the liability **in rem,** is when it is made to appear that the transferee actually received the res, so that his status as transferee becomes legally fixed, and thereafter disposes of the res. **The personal liability would then be substituted for the liability in rem.**

We submit that there is not the slightest foundation for the gratuitous assertion that the refund of the

taxes paid by the petitioners was "an erroneous refund." No such contention was ever made or even suggested. The refund was made because it was determined that these petitioners were not the owners of the stock and had not received the money from the corporation. It was merely asserted that they later received the money from Jacob as a gift, a contention that has since been abandoned.

This refund was made to pave the way for the assertion of transferee liability against Jacob.

## RE CASES CITED BY RESPONDENT

The **Hutton** and **Fairless cases** cited by respondent are discussed at pages 45 to 48 of Appendix.

## VII

## RE INSOLVENCY AND EXHAUSTION OF REMEDIES PRIOR TO COMMENCEMENT OF TRANSFEREE PROCEEDING

### A

It is argued that it was unnecessary to establish in this case the exhaustion of remedies against the taxpayer prior to the commencement of the transferee proceeding because the corporation was dissolved and therefore could not be proceeded against by action. This contention has no support in fact or in law. The alleged transfer took place in August, 1937. The corporation was dissolved by proclamation of the Governor

on January 6, 1941 (tr. p. 211). The notice of transferee liability is dated April 8, 1941. For at least a part of that **intervening period** of more than three and a half years the corporation actually functioned, and bought, owned and operated hotel property. During that time its primary tax liability could have been enforced.

The ultimate dissolution did not terminate the corporation or prevent proceeding against it.

Sec. 77-259 Oregon Compiled Laws Annotated, keeps a corporation alive for a period of five years after dissolution for the purpose of liquidating its assets and paying its liabilities and it can sue or be sued to the same extent as if it had not been dissolved.

See text of statute, page 58 of Appendix.

The dissolution of the corporation did not preclude proceeding against it where there is a statute similar to the Oregon law. **(Ray vs. Comm., 24 B.T.A. 94-96** (see page 58 of Appendix).

Respondent argues the point as though the crucial time is the date of the notice of transferee liability. That is not true. The crucial period of time is the time of the transfer and the period of time immediately following. If the transferor—taxpayer—had property out of which the primary tax liability could have been satisfied the respondent was obliged to pursue the corporation. He could not wait indefinitely until the corporation ceased to do business, disbursed its assets and then initiate transferee proceedings. If he could have

satisfied the liability at any time during the intervening period against the primary obligator, he is precluded from thereafter proceeding against the alleged transferee.

**B**

It is next contended that proceeding against the taxpayer was not required as a condition precedent because it would have been futile. This contention is likewise unsupported by the record.

Here again respondent proceeds as though the possibility of enforcement of the liability against the taxpayer must be determined as of the date of the notice of transferee liability. The law is that the crucial time is the time of the transfer and the intervening period. **(Terrace case, page 24 Appendix former brief.)** If the corporation had assets out of which the transferee liability could have been satisfied, it cannot be contended that proceedings against the taxpayer would have been futile.

Respondent has not sustained the burden of proving futility, for the corporation actually had at least $20,400.00 which remained in the corporation. After the purchase of Arlington Hotel, there remained the undistributed portion of $20,400.00, which was in excess of $11,000.00. Ownership of these assets by the corporation can not be read out of the record by the liberal resort to adjectives.

**C**

It is asserted that the finding that the taxpayer

was left insolvent at the time of the transfer is "amply supported by the uncontradicted evidence."

The evidence of the corporation's financial condition at the time of the alleged transfer and subsequent thereto is discussed at length at pages 65-72 of petitioners' former brief. Appraisal of that evidence demonstrates that respondent failed to sustain the burden of proof that the corporation was left insolvent as the result of the alleged transfer.

## CASES CITED BY RESPONDENT

We have no quarrel with the cases cited in respondent's brief, page 40, insofar as they hold that respondent need not bring any proceedings prior to the initiation of transferee proceedings **if they would be futile.** But we take issue with respondent that they support the proposition that **in all cases** transferee proceedings can be initiated "in the absence of insolvency" and "without first attempting to collect the tax from the transferor."

The burden of proof was, of course, upon respondent to establish futility of proceeding against the taxpayer. There is no support for a finding that such proceeding would be futile.

The concluding sentence in the quotation from the **Coffee Pot Holding Corporation case** (res. br. p. 41) was pure dicta and not essential to the decision of that case because it was found in the Coffee Pot case, as a fact, upon ample evidence, that proceedings would be

futile. The dicta was general and entirely too broad and is not supported by the cases cited in support thereof.

In the **Wheeling Mold & Foundry Co. case,** there cited, it was held that a prior proceeding against the taxpayer was unnecessary because in that case the action was **based upon an agreement** by which the transferee **assumed the payment of the debt.** Its liability was therefore primary upon the assumption agreement.

In the **American Equitable Assurance Co. case** the action was also on an **assumption agreement** by which the transferee specifically assumed "all taxes". That too, created primary liability which could be enforced directly without any conditions precedent.

In the **Hatch case,** the sole asset of the taxpayer was a lease. This lease was transferred to the Morasco Holding Co. This left the transferor without any assets whatsoever.

There was no issue of fact upon that subject. The case was submitted "upon an agreed statement of facts." Under these conditions it is obvious that proceeding against the transferor would be futile.

The dicta referred to above obviously went beyond the scope of the decisions cited.

In **U. S. v. Garfuncle,** cited by respondent, the question arose on demurrer to the complaint which necessarily **admitted** the allegation made therein of insol-

vency of the taxpayer and futility of proceeding. In the case at bar there was no allegation of futility in respondent's answer and the allegation of insolvency was denied, thus raising an issue. Futility is dispelled in the case at bar because the corporation actually had assets.

## VIII

## RE ESTOPPEL

### A

Respondent contends that he is not estopped by the prior proceedings from asserting this transferee liability against petitioners because they failed to establish, that they relied upon respondent's conduct and changed their position for the worse by acting thereon. Petitioners do not claim the benefit of "equitable estoppel". Petitioners invoke the doctrine of "estoppel by judgment." Change of position is essential to "equitable estoppel," but not to "estoppel by judgment." The latter **doctrine is one of public policy. (Tait vs. Western Maryland Ry. Co., 289 U.S. 620.)**

The basis of the doctrine of estoppel by judgment is stated in **15 R.C.L. 953, Sec. 430.** The writer says:

> "An estoppel by verdict and judgment is founded on the principle of the maxim, Interest reipublicae ut sit finis litium, and the true limits of the doctrine are accurately stated in another maxim, Memo debet bis vexari si constet curiae quod sit pro una et eadem causa. Public policy

and the interest of litigants alike require that there be an end to litigation, and the peace and order of society demand that **matters distinctly put in issue and determined** by a court of competent jurisdiction as to parties and subject matter shall not be retried between the same parties in any subsequent suit in any court."

**B**

Petitioners do not claim that the doctrine of res judicata applies. We invoke the rule of "estoppel by judgment" and to make it applicable, identity of issue or fact is sufficient.

If there is a common issue of fact, the doctrine applies. In **15 R.C.L. 593** in discussing the scope of res adjudicata and estoppel by judgment the writer says:

"A judgment may, however, operate as an estoppel in another action between the same parties **as to matters in issue or points controverted,** upon the determination of which the finding or verdict was rendered, **though the second action is upon a different claim or demand."**

The prior adjudication of the fact in issue is available to the parties and **their privies.** According to respondent's theory, Jacob and petitioners are in privity for it is claimed that they received the fund through Jacob.

In **Portland Gold Mining Co. v. Stratton's Independent, 158 F. 63 (8th Cir.),** Justice Van Devanter, after an extensive review of the decisions said:

> "When the plaintiff has litigated directly with the **immediate actor** the claim that he was culpable, and, upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there is manifest propriety, and no injustice, in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible. To such a case the maxim, 'Interest reipublicae ut sit finis litium,' may well be applied."

This case has been frequently cited and is regarded as a leading case.

The principle there affirmed is applicable in the case at bar with greater force, for here respondent not only brought prior proceeding against the one who was the "immediate actor" but it obtained a judgment against him **sustaining respondent's contention.**

Respondent makes the bald assertion that there was no privity between Jacob and these petitioners. No authority is cited in support of that assertion. It is only claimed that the case of **Tait vs. Western Maryland Railway Co.** is not authority for the proposition that there is privity between Jacob and the petitioners.

In the **Tait** case the first proceeding was against the **Commissioner** to re-determine a deficiency assessed against the taxpayer. The Second proceeding was by the taxpayer against the **collector** to recover refund. The Supreme Court held that there was privity between the Collector and the Commissioner so as to

make the prior determination operate as an estoppel because the Collector was in effect the **agent** of the Commissioner. It was the **element of agency** that created the privity and not the mere fact that they happened to be public officials. The Court said:

> "We think, however, that where a question has been adjudged as between a taxpayer and the government or its official **agent**, the Commissioner, the collector, being an official inferior in authority, and acting under them, is in such **privity** with them that he is estopped by the judgment. See Second National Bank of Saginaw v. Woodworth (D.C.) 54 F. (2d) 672; Bertelsen v. White (D.C.) 58 F. (2d) 792.

The two cases cited by the court in that decision confirm this view.

In the case at bar, respondent contends that petitioners are liable in this proceeding because the receipt of the fund by Jacob was constructively receipt by them. Obviously that makes them in privity with respect to the fund in question. In the **Tait case** the Collector collected the taxes as agent of the Commissioner. In the case at bar, it is claimed by respondent that Jacob collected the fund on behalf of the petitioners. Obviously the same principle is here applicable.

It is argued that the Commissioner is not prohibited "from taking inconsistent positions in cases involving other parties" and several cases are cited in support of this assertion.

We are not concerned merely with the right of the Commissioner to take inconsistent **"positions."** We are concerned with **"determinations".** It may be that as long as no determination is made that the Commissioner may change his position if it develops that he was in error. But when with knowledge of the facts he has taken a position **and a determination is made thereon by himself** or by the courts in litigation, the authorities are agreed that he is estopped by such **determinations.**

The cases cited by respondent on the subject of estoppel are discussed at pages 48 to 51 of Appendix.

## C

## RE ELECTION OF REMEDIES

There is no foundation for the distinction which respondent makes between this case and the **Brown case** (p. 37 Appendix, former brief). Respondent has maintained throughout and maintains here that the receipt of the fund by Jacob was constructively receipt by petitioners on the theory that he was their agent or trustee. In order to maintain the distinction, respondent would now have to repudiate the contention that Jacob was petitioners' agent or trustee and, with such repudiation, the contention that petitioners are transferees must, of course, fail.

On the other hand if a relationship does exist, then respondent had choice of proceeding against one or the other but not against both.

**Insurance Co. of North America v. Fourth National Bank, 28 F. (2d) 933 (5th Cir.).**
**Henderson Tire & Rubber Co. v. Gregory, 65 F. (2d) 589.**
**28 C.J.S. 1073, Sec. 8.**
**18 Am. Jur. 135, Sec. 12.**
**2 C.J. 843, Sec. 526.**
**McNamara v. Chapman, 31 A.L.R. 188.**

(See text of the foregoing authorities at pages 51 to 55 of Appendix.)

When the proceeding against Jacob was initiated, respondent had knowledge of all the facts. He had already considered whether Jacob or petitioners were transferees in the earlier proceeding, which resulted in the refund of the tax paid by the petitioners. The facts were also narrated in the memorandum which was attached to the income tax returns. Full investigation had been made. The funds at that time and at all times thereafter were in the hands of Jacob. They were not turned over to petitioners.

Under these conditions respondent was called upon to pursue Jacob as transferee or to pursue these petitioners as transferees of the identical fund. He elected to treat Jacob as the transferee, prosecuted the transferee proceeding against him and **established therein Jacob's status as transferee.**

Respondent in that proceeding was required to allege a fact and assume a position "inconsistent with" or repugnant to the facts now alleged, for in the prior proceeding respondent alleged that Jacob was the transferee and specifically denied Jacob's allegation

that the present petitioners were the transferees. (28 **C.J.S. p. 1073, Sec. 8.**)

This case is analogous to the cases in which a plaintiff elects to sue the agent or the undisclosed principal after discovery of the facts and it is uniformly held that the prosecution of an action against one forecloses proceeding against the other. Having elected to treat Jacob as the transferee, and having established that status, there was a repudiation of the contention that petitioners were the transferees.

In **Eichelberger & Co. v. Comm.**, 88 **F. (2d) 874 (5th Cir.)** the Court said:

> " 'He cannot justly decide in 1930 that the sale did not realize the loss and thereby collect increased taxes, and in 1932 decide that it did realize the loss and collect taxes accordingly again . . . The United States got the benefit of his decision then and ought to abide by it now.' "

The **Peir case** and the **Pierce case** cited by respondent are discussed at pages 55 to 57 of Appendix.

Respectfully submitted,

S. J. BISCHOFF,
Attorney for Petitioners.

# APPENDIX

## APPENDIX

In the **Ventura case, 86 F. 2d 149 (9th Cir.)**, the Commissioner served a deficiency notice upon the taxpayer. The taxpayer filed a petition with the Board to redetermine the deficiency. Pending this proceeding, the Collector attempted to enforce by distraint the collection of the portion of the tax for the taxable year in question which was not in dispute. The taxpayer sought an injunction to enjoin the collection on the ground that the Board of Tax Appeals had acquired jurisdiction over the entire tax for the year in question which was subject to redetermination. This court, in sustaining the right to an injunction held:

> "That proceeding is for the redetermination of the **whole tax** in which there may be determined a **refund** to the taxpayer of all or part of his original payment, or, he may be found to owe the government an even greater sum than the amount computed by the Commissioner in his assessment letter. The Commissioner need not claim the increase in his pleading on the appeal, but as the proof progresses he may assert it at the hearing. He may assert it even at a rehearing. **That is to say, the Board has a free hand to proceed to determine the total tax due and the amount not paid regardless of the form in which the issue is presented.**
>
> "These are risks facing both the taxpayer and the Commissioner at the hearing before the Board, as shown by the provisions of the statutes:"
>
> . . . . . .
>
> "Such is the holding of Peerless Woolen Mills v Rose (CCA), 28 Fed. (2) 661, 662,"
>
> . . . . . .

"'We are of the opinion that it results from these statutory provisions that, while the Board has no jurisdiction where there is no deficiency assessment, yet, if there is a deficiency assessment, the jurisdiction of the Board extends to the **whole controversy,** to the end that it may determine or redetermine the correct amount of the tax."

The dissenting opinion of Justice Wilbur concurs with the majority upon this phase of the case. He said:

"The opinion of the majority sustains the contention of the Collector that on the appeal from the second deficiency letter the Board of Tax Appeals had jurisdiction to determine the total tax due from the taxpayer for the years 1920 and 1921. This decision is in accord with the decision of the Circuit Court of Appeals for the Fifth Circuit in **Peerless Woolen Mills v. Rose, 28 F. (2d) 661,** cited by the Attorney General in support of his contention. That court declined to enjoin the collection of a tax assessed October 19, 1919, because it appeared that an appeal had been taken from a second deficiency assessment made December 18, 1925, and the question of the validity of the first assessment (also a deficiency assessment) was thus presented to the Board of Tax Appeals. The court stated, '* * * the jurisdiction of the Board extends to the whole controversy, to the end that it may determine or redetermine the correct amount of the tax.' This view is in accord with a decision of the Circuit Court of Appeals for the First Circuit in **American Woolen Co. v. White, 56 F. (2d) 716.** That court cites with approval the decision in **Peerless Woolen Mills v. Rose, supra,** and **Bankers Reserve Life Ins. Co. v. U. S., 44 F. (2d) 1000, 1002,** and holds that on an appeal from a second deficiency notice given December 17, 1930, the Board of Tax Appeals had

jurisdiction of an assessment made on the taxpayers' return in 1922.

"I am inclined to agree with my associates that the Board of Tax Appeals, on the appeal of the taxpayer from the second deficiency letter, had jurisdiction to consider and determine the entire tax of the taxpayer for the year."

Since a transferee proceeding is to be initiated and determined it follows as a matter of course that when respondent prosecuted the former transferee proceeding against Jacob, Conley and Barns, and a petition to review was filed with the tax court, that this jurisdiction to prosecute a further transferee proceeding for the taxable year was exhausted, "in the same manner and **subject to** the same provisions and **limitations** as in a case of deficiency in a tax imposed by this title."

The **Hutton case,** cited by respondent (br. p. 35) is not at all in point. No attempt was made in that case to fasten transferee liability by reason of an alleged constructive receipt of the corporate asets. In that case Hutton, the sole stockholder, **actually** received all of the assets of the corporation upon dissolution. No attempt was made to hold him by reason of the receipt by someone else for his account. At the moment he received its assets, his liability as transferee accrued. His subsequent disposition of the funds could not affect that liability. The only effect of the subsequent dissipation of assets received was to convert his liability in rem to a personal liability. So long as the transferee has the assets the liability is in rem. This idea is made manifest by the quotation from **Rogge** on transferee liability, quoted on page 36 of the respondent's brief. He points out that the proceed-

ing is **in rem** and that where the transferee has "dissipated or disposed of the property so that a decree to set aside the conveyance would be impossible or impractical personal liability entered against him."

In the case at bar, petitioners have neither received nor have they dissipated any assets of the corporation and hence there could be no personal liability on their part.

In the case at bar the res being pursued was traced to the hands of Jacob. There the transition stopped and if there was any transferee liability it was upon him. This liability was asserted by respondent against him and it was established and satisfied.

The **Fairless case,** cited by respondent (p. 36), is not at all in point. There the Union Finance Co. (taxpayer) transferred all its assets to The Metropolitan Securities Co., in exchange for the stock of the latter company. The Union distributed this stock to its stockholders without liquidating its tax liability. Transferee liability was assessed against the stockholders of the Union on the ground that they received the assets (Metropolitan stock) of the corporation. The petitioners there made the contention that only the recipient of the physical assets or property of the Union—the Metropolitan—was liable as transferee. The Board and the Circuit Court of Appeals rejected this contention, and rightly so, because the Union had merely exchanged its physical property for capital stock of the Metropolitan. This transaction alone, prior to the distribution to the stockholders, did not

impair its ability to pay its tax liability. It was the subsequent distribution of the Metropolitan stock to the stockholders (petitioners) which stripped it of assets with which to meet its tax liability and the stockholders having received its assets became liable as transferees regardless of the question whether the Metropolitan could have been held liable therefor. These stockholders were, of course, liable to the extent of the value of the stock they received from the Union. There is nothing in common between the case cited and the case at bar. In the **Fairless case** the Metropolitan stock which the Union received was the res. This was the res that was transferred to the stockholders—petitioners—and they were liable in rem therefor.

Section 77-259 in Oregon Compiled Laws Annotated provides that:

> "All corporations that . . . have been dissolved by proclamation of the governor, as by law provided, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending any actions, suits or proceedings by or against them, settling their business, disposing of their property, both real and personal, dividing their capital stock, and doing any and all things necessary for the care and preservation of their property, both real and personal, but not for the purpose of continuing their corporate business. During such five-year period after such dissolution, they shall continue as such bodies corporate, for the purpose of causing to be executed on behalf of such corporations conveyances of or other instruments affecting title to such property, for being made

parties to, and being sued in any action, suit or proceeding against them, for the recovery of any property, or the enforcement of any remedy against them, or against any property or the enforcement of any remedy that might have been had prior to such dissolution."

In the **Iglehart case,** cited by respondent on page 46, the Commissioner in one proceeding took the position that a certain transfer was not made in contemplation of death. In the second proceeding he took the opposite position. But the first proceeding was pending and undetermined when the latter proceeding came on for trial. While the second proceeding was under consideration, the first proceeding was determined adversely to respondent's contention. The ruling of the Court was consistent with the position taken by respondent in the second proceeding. There was no inconsistency between the "determination" in the first proceeding and that taken in the second proceeding.

In the case at bar, however, the Commissioner not only made the contention in the two former proceedings that Jacob was the transferee but actual **determinations** were made thereon in accordance with his contention. The determinations are inconsistent with the contention now advanced. The situation is the reverse of the situation in the **Iglehart case.**

The quotation appearing on page 46 of respondent's brief standing alone is misleading. To get the full significance of the ruling in that case, the decision of the Board of Tax Appeals (28 B.T.A. 888) and the full text of the decision by the Circuit Court of Appeals

must be read together. The Circuit Court of Appeals pointed out that the first contention made by respondent was overruled by the decision of the Circuit Court of Appeals.

Moreover, in that case petitioner did not claim the benefit of the rule of estoppel by judgment. The question arose on the petitioners request that the court take judicial notice of the prior pending proceeding to "disclose that in that case respondent took an inconsistent position." **The offer was refused because no showing had been made as to the nature of the prior proceeding to demonstrate relevancy.**

The observations of **Mr. Griswald** in his article in **46 Yale Law Journal 1320,** to which respondent's counsel refers do not support respondent's position. The observations of Mr. Griswald are of little practical aid in considering the question involved. He does not attempt to state what the rule is upon this subject. He merely calls attention to the fact that in some cases the doctrine of estoppel was applied but not in others. He calls attention to three cases, to wit, the **Iglehart case,** which has already been discussed, the **Blair case 300 U. S. 330,** and the **Hall case, 31 B. T. A. 125.**

As already pointed out in the **Iglehart case,** the matter referred to was not a determination by the Commissioner, Board of Tax Appeals, or the Courts. It was merely a position taken by the Commissioner and at the time it was offered in evidence had not yet been determined by any Court. It was later rejected by the Court.

In the **Hall case,** the first proceedings was against the corporation which had exchanged stock for stock and involved the determination of the basis of valuation. The corporation claimed that no gain was recognizable because it was a tax free exchange. The second proceeding was against the individual stockholder Hall, who had received some of the stock and it was asserted that the determination in the corporation case was an estoppel against the commissioner. But the Board declined to give the effect of an estoppel to the prior proceeding against the corporation because:

> "When the case was called for hearing, no appearance was entered upon motion of counsel for respondent the case was dismissed for failure to prosecute and decision was entered for the respondent . . . It is sufficient to say that the default decision entered at Docket No. 63206 was not an adjudication on the merits and can not in any way operate to bar the respondent from maintaining this cause or prevent their determination of the question presented on the issues raised."

It was obvious, therefore, that the refusal to treat the prior case as an estoppel was not because it could not do so, but because no determination was made.

In the **Blair case** the Court refused to treat the prior proceeding as an estoppel because subsequent to the determination of the first proceeding there was **"created a new situation."** It is obvious from the decision that if that new situation had not intervened that the prior determination would have been given the effect of an estoppel.

When the basis of the decision in these cases is kept in mind, Mr. Griswald's observations can be accorded very little authoritative effect. Indeed he did not attempt to lay down any rule. He merely pointed out the cases in which prior proceedings were held to be or not to be estoppel.

In the **Gwin case** cited by respondent (p. 46) the application of the rule of estoppel by judgment was not raised, discussed or passed upon by the Board or by the Court of Appeals. The petitioner in that case had no relationship to the petitioner in the prior proceeding. They were both members of a syndicate from the operation of which each derived certain profits, but there was no relationship between them that would involve a question of the responsibility of one for the acts of the other. Each proceeding involved the personal tax liability of each of the parties. Neither the petitioner nor the respondent in that case claimed that the prior determination was conclusive.

In **Insurance Company of North America vs. Fourth National Bank, 28 F. 2nd 933 (5th Cir.)** an employee of the bank embezzeled funds by cashing drafts at the defendant bank, with which plaintiff had a bank account. Plaintiff sued the bank on the ground that they cashed the drafts on forged endorsements. It was established, however, that plaintiff had brought an action against its employee and his wife, that some adjustment of the action was made, whereby plaintiff received property and funds from the employee and his wife, but the suit was not dismissed. The court held:

"In such circumstances, we think the lower court was correct in holding that the plaintiff had made an election to pursue the property and funds in the hands of its agent, and could not thereafter maintain its claim for money had and received against defendant." (citing many cases.)

In **Henderson Tire & Rubber Co. vs. Gregory, 65 F. 2nd** 589,—49 A. L. R. 1503-1510, the Court held:

"The doctrine stated in its simplest form means that, if a party has two inconsistent existing remedies on his cause of action and makes a choice of one, he is precluded from thereafter pursuing the other. **The doctrine may be applicable as well where the remedies are against different persons as where they are against the same person."**

In 28 C. J. S. 1073, **Sec.** 8, the rule is stated as follows:

"Where a party has grounds to bring separate actions against different persons, and the maintenance of one necessitates the allegation of a fact, or the assumption of a position, inconsistent with, or repugnant to, the maintenance of another, he is bound by his election, and cannot proceed against the other. In other words, where a party has suffered an actionable wrong he will not be permitted to pursue inconsistent remedies against different persons."

In 18 **Am. Jur.**, 135, **Sec.** 12, the rule is states as follows:

"Whether co-existent remedies are inconsistent, is to be determined by a consideration of the relationship of the parties with reference to the right sought to be enforced as asserted in the pleadings. Two modes of redress are inconsistent if the assertion of one involves negation or repudiation of the other."

In 2 C.J. 843, Sec. 526, the text says:

> "While a person who has dealt with the agent of an undisclosed principal may elect to hold either the agent, or, upon discovery, the principal, **he cannot hold both,** and, **if** with full knowledge of the facts material to his rights **he elects to hold the agent, he thereby discharges the liability of the principal;** and conversely, if he elects to hold the principal, he thereby discharges the liability of the agent. **He must elect between the two, and when an election is once made he must abide by it,** unless the principal and agent have by their acts waived the right to claim that an election to hold one releases the other.

Among the many cases cited in support of this rule in the footnote appears the following:

> "(a) **Claim cannot be split.**—Where materials are furnished, and charged to the agent of an undisclosed principal, the creditor may, after discovering the facts, hold either the principal or agent, at his election, but **he cannot divide his claim, and hold both as principal debtors, the one for a part and the other for the remainder of the debt.** Booth v. Barron, 29 App. Div. 66, 51 NYS 391."

So in the case at bar either Jacob was the transferee or these petitioners were the transferees of the identical fund. Both could not be.

The same principal is applied in tort cases. In **McNamara vs. Chapman, 31 A. L. R. 188,** an action was brought in tort against the master and a recovery was obtained. Thereafter an action was brought against the servant for the same cause of action and liability was denied. The Court held:

"The plaintiff has his election to treat the master and servant as one and recover from the master, or to disregard their relation and recover from the servant. He could treat the servant's act as that of the master, but not as that of both master and servant. **Such situations are not unknown in other phases of the law** relating to acts done in a representative capacity. If an agent acts for an undisclosed principal, the other party to the transaction may, upon discovery of the facts, proceed against either; but, having elected to proceed against one, he cannot thereafter pursue the other. **He cannot maintain his action against both, nor, having elected with a knowledge of the facts to look to the agent, can he afterwards turn around and hold the principal.'** Chandler v. Coe, 54 N. H. 561, 568; Elkins v. Boston & M. R. Co. 19 N. H. 337, 342, 51 Am. Dec. 184.

**"On the contract side,** the reasonableness of the **rule** has been clearly seen, and it has been **uniformly applied**. The statements of the reasons for the rule in those cases are equally convincing here. 'Granting that each was liable, both were not, for both could not be at one and the same time, since the contract could not be the personal contract of the agents, and yet not their contract, but that of the principal. The vendor has a choice and was put to his election.' Tuthill v. Wilson, 90 N. Y. 423, 428.

. . . . . .

"In this case the plaintiff made his choice, his claim of identity prevailed, and he has a judgment thereon It may be that if the result of the former suit had been a judgment for the defendant upon the ground that identity was not shown, the plaintiff could have avoided being charged with having elected, because he had mistaken the facts as to identity. Noyes v. Edgerly, 71 N. H. 500, 53 Atl. 311. But where the judgment shows that there was no such error, that the facts were exactly as the plaintiff understood and claimed them to be, his election is complete, and he is bound by it."

Additional cases are cited in the annotation following that case.

That is just what respondent did here. He sought and obtained recovery for part of the debt from Jacob (claimed to be the agent) and now seeks to recover another part of the same debt from petitioners, who, respondent insists, are the principals.

The **Peir case,** cited by respondent (page 48), is not applicable. In that case the question decided by the prevailing opinion was not "estoppel by judgment" or "election of remedies." It was merely decided that payment "under protest" accompanied by a claim for refund made by one party claimed to be a transferee, did not constitute payment of the tax so as to discharge from liability those held to be transferees. The facts were that the Western Oxygen Co. (taxpayer) transferred its physical assets to the Air Reduction Co. in exchange for the capital stock of the latter company. The taxpayer later distributed the Air Reduction stock to its own stockholders as a liquidating dividend. Later a deficiency in tax was assessed against the taxpayer and having no assets with which to pay the same, the Commissioner **simultaneously** served a notice of transferee liability on the Air Reduction Co. and upon the stockholders of the taxpayer who received the Air Reduction stock. The Air Reduction Co. paid the amount so assessed "under protest" with a claim for refund, based on the ground that it was a purchaser of the physical assets of the Western Oxygen Co. for value. The claim for refund was allowed and the

money paid by Air Reduction Co. was refunded to it.

In the transferee proceeding against the stockholders they contended that they were **discharged** from the liability **by the payment** made by the Air Reduction Co. This Court held:

> "The payment was a conditional one and does not act as a discharge until the conditions are resolved against the taxpayer . . . it may or may not be legally liable but until it has paid the tax and such payment is final and unconditional, the tax remains unpaid insofar as the rights of the others who may be liable are concerned.
>
> . . . . . .
>
> Should the determine that the payor was without liability, the situation will be exactly as though the payment had not been made . . .
>
> . . . . . .
>
> We agree with the Board in holding that the tax has not been paid as to bar the Commissioner from proceeding against petitioners for its collection."

It is thus apparent that the Court did not decide any question pertaining to estoppel or election of remedies but merely the question whether the conditional payment later refunded to the Air Reduction Co. constituted payment of the tax liability so as to discharge further liability therefor.

The question of election of remedies was apparently not an issue in the case. The two opinions of the Board of Tax Appeals (33 B. T. A. 643 and 34 B. T. A. 1059) discuss only the question of discharge by payment and the prevailing opinion does not discuss the

question. The subject was touched upon by Judge Haney in his concurring opinion. It is obvious that he did not intend to convey the idea that the proceeding against one party did not constitute an election of remedies in all cases. He obviously intended to convey the idea that **under the facts in that case** the mere assertion of transferee liability against the Air Reduction Company simultaneously with the assertion of the liability against the stockholders of the taxpayer did not constitute an election. There never was any determination of the transferee liability by the Board of Tax Appeals or by any court. The Commissioner merely asserted the liability, Air Reduction Co. paid it under protest, coupled with a claim for refund, and the refund was made. Hence the excerpt from Judge Haney's opinion can not be authority against the position of the petitioners in this case.

In the **Peirce case, 255 U. S. 398,** which was cited by Judge Haney in connection with the aforesaid observation, the Government brought a suit for enforcement of a tax collection against a corporation that had assumed the liabilities of the taxpayer and it also brought a suit against stockholders as transferees of the taxpayer. That was clearly a case where both parties proceeded against, were liable for the tax; one party because it assumed the obligations and the other parties because they were transferees. There was no inconsistency in proceeding against both. In the case at bar Jacob and the present petitioners were not both liable for the corporation's tax. Either

Jacob was the transferee and liable for the whole of it, or these petitioners were the transferees and liable for the whole of it.

**Sec. 77-259 O.C.L.A.** provides:

> "All corporations that . . . have been dissolved by proclamation of the governor, as by law provided, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending any actions, suits or proceedings by or against them, settling their business, disposing of their property, both real and personal, dividing their capital stock, and doing any and all things necessary for the care and preservation of their property, both real and personal, but not for the purpose of continuing their corporate business. During such five-year period after such dissolution, they shall continue as such bodies corporate, for the purpose of causing to be executed on behalf of such corporations conveyances of or other instruments affecting title to such property, for being made parties to, and being sued in any action, suit or proceeding against them, for the recovery of any property, or the enforcement of any remedy against them, or against any property in which such corporations have an interest. During such five-year period after such dissolution, any suit, action or other proceeding may be instituted and maintained against any such corporations for the recovery of any property, or the enforcement of any remedy that might have been had prior to such dissolution."

In **Ray vs. Commissioner, 24 B.T.A. 94-96,** the Board held:

> "The respondent contends that he has met the burden of proof required of him when he has es-

tablished that the tax in question was assessed against the Falconer Mirror Company; that it has not been paid; that the said company was dissolved; that the petitioner was the owner of 15 shares of stock of that corporation; and that it distributed to its stockholders a liquidating dividend of 46 per cent. The law and the facts in the case at bar do not support his view. As we said in Continental Oil Co., 23 B.T.A. 311:

> " 'The provisions of section 280 constitute an extraordinary method of collecting the taxes of the person who is primarily liable therefor, and consequently they must be construed strictly against the respondent.'

"In Annie Temoyan, et al., Trustees, 16 B.T.A. 923, we said:

> " 'It is evident that the statute places a real burden on the Commissioner. He must establish the liability of the transferee against whom he proposes to proceed. He must establish all facts necessary to show that there is a liability at law or in equity on the part of the transferee for the payment of the whole or a part of the liability.'

"The mere facts that a corporation is dissolved and that its assets were distributed are not of themselves sufficient to hold the distributee."

. . . . . .

"It is obvious that the corporate existence of the Falconer Mirror Company continued after its dissolution. Indeed, the statute expressly authorizes such continuance for the very wise purpose of paying its creditors, collecting debts due to it, and doing such other acts as might be necessary in concluding its business. The taxes due from the Falconer Mirror Company are such debts as might have been collected from that corporation subsequent to its dissolution if there were funds available for their payment."

In the case at bar the dissolution did not take place until more than three and a half years after the alleged transfer and the corporation had assets during that time "available for their (taxes) payment."